119 ORIGINAL

STATE OF CONNECTICUT, COMMONWEALTH OF MASSACHUSETTS, AND THE STATE OF RHODE ISLAND, PLAINTIFF

V.

NEW HAMPSHIRE

FILED:
October 30, 1991 — Motion for leave to file Bill of Complaint

COUNSEL FOR PLAINTIFF: Richard Blumenthal, Scott Harshbarger, James E. O'Neil

COUNSEL FOR DEFENDANT: Jeffery R. Howard

Oct. 30, 1991	Motion for leave to file Bill of Complaint filed.
Dec. 27, 1991	Brief of amici curiae of New England Council and Associated Industries of Massachusetts in support of the motion filed.
Dec. 30, 1991	Brief in opposition to motion for leave to file Bill of Complaint filed.
Dec. 31, 1991	DISTRIBUTED. Jan. 17, 1992.
Jan. 10, 1992	Reply of Connecticut, et al. in support of the motion for leave to file Bill of Complaint filed.
Jan. 21, 1992	REDISTRIBUTED. Jan. 24, 1992.
Jan. 27, 1992	**ORDER:** Motion for leave to file Bill of Complaint is GRANTED. Defendant is allowed 60 days in which to file an answer. The Chief Justice and Justice Scalia would set the motion for oral argument. Justice Souter took no part in the consideration or the decision of this motion.
Mar. 25, 1992	Answer of the defendant New Hampshire filed.
Mar. 25, 1992	DISTRIBUTED. Apr. 17, 1992.
Mar. 27, 1992	Motion on behalf of the Connecticut Office of Consumer Counsel for leave to intervene, for leave to file Bill of Complaint, and brief in support of the motion to intervene filed.
Apr. 9, 1992	Response by the New Hampshire to the motion of Connecticut Office of Consumer Counsel for leave to intervene and for leave to file Complaint received.
Apr. 16, 1992	Motion of United Illuminating Company, et al. for leave to intervene filed.
Apr. 27, 1992	**ORDER:** it is ordered that the Honorable Vincent L. McKusic, retired Chief Justice, Supreme Judicial Court of Maine, be appointed Special Master in this case with authority to fix time and conditions for the filing of additional pleadings and to direct subsequent proceedings,

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	with authority to summon witnesses, issue subpoenas, and take such evidence as maybe introduced and such he may deem it necessary to call for. The Master is directed to submit such reports as he may deem appropriate. The compensation of the Special Master, the allowances to him, the compensation paid to his legal, technical, stenographic, and clerical assistants, cost of printing his reports, and all other proper expenses, including travel expenses, shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct. Justice Souter took no part in the consideration or decision of this order.
Apr. 29, 1992	Response by New Hampshire to the motion of United Illuminating Co., et al. to intervene filed.
Apr. 29, 1992	DISTRIBUTED. May 15, 1992.
May 4, 1992	Oath of the Special Master filed.
May 8, 1992	Amended oath of the Special Master filed.
May 13, 1992	Reply brief of United Illuminating Co., et al. in support of the motion to intervene filed.
May 18, 1992	**ORDER:** The motion of Connecticut Office of Consumer Counsel for leave to intervene is referred to the Special Master. The motion of United Illuminating Co., et al. for leave to intervene is referred to the Special Master. Justice Souter took no part in the consideration of these motions.
May 26, 1992	First Interim Report by the Special Master received.
June 15, 1992	**ORDER:** The First Interim Report of the Special Master is received and ordered filed. The Recommendations of the Special Master are adopted. It is ORDERED that the motion of Connecticut Office of Consumer Counsel for leave to intervene is DENIED. It is further ORDERED that the motion of United Illuminating Company, New England Power Co., Connecticut Light and Power Co., Canal Electric Co., Montaup Electric Co., and Taunton Municipal Lighting Plant for

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	leave to intervene is GRANTED. The defendant is allowed 20 days within which to file and serve its answer to the complaint of the intervening plaintiffs. Justice Souter took no part in the consideration or the decision of these orders.
Jun. 16, 1992	Motion of Massachusetts Municipal Wholesale Co. for leave to participate as amicus curiae filed. (NP)
Jun. 17, 1992	DISTRIBUTED. Jun. 19, 1992 (above motion)
Jun. 22, 1992	**ORDER:** The motion of Massachusetts Municipal Wholesale Electric Company for leave to participate as amicus curiae in this case is GRANTED. Justice Souter took no part in the consideration or decision of this motion.
Jul. 1, 1992	Answers of the Defendant New Hampshire to the complaint of the utility intervenors filed.
Jul. 22, 1992	DISTRIBUTED. Sept. 28, 1992 (answer of NH)
Oct. 5, 1992	**ORDER:** Answer of New Hampshire to the complaint of utility intervenors is referred to the Special Master. Justice Souter took no part in the consideration or decision of this order.
Dec. 31, 1992	Report of the Special Master received. Docket of the Special Master filed.
Jan. 6, 1993	DISTRIBUTED. Feb. 19, 1993 (Report of Special Master)
Jan. 11,1993	REDISTRIBUTED. Jan. 15, 1993 (Report of Special Master)
Jan. 15, 1993	**ORDER:** The Report of the Special Master is received and ordered filed. Exceptions to the Report, with supporting briefs may be filed by the parties. Such exceptions must be received by the Clerk and served upon opposing counsel on or before 3:00pm, March 1, 1993. Reply briefs, if any, must be received by the Clerk and served upon opposing counsel on or before 3:00pm March 31, 1993. Rule 29 does not apply. The case is set for oral argument during the session beginning April 19, 1993. Justice Souter took no part in the consideration or decision of this order.

Feb. 1, 1993	Supplement to Final Report of the Special Master received.
Feb. 3, 1993	DISTRIBUTED. Feb. 3, 1993 (above supplement)
Feb. 17, 1993	Motion of the Special Master for award of fee and disbursements.
Feb. 19, 1993	**ORDER:** The Supplement to the Final Report of the Special Master is received and **ORDERED** filed. Exceptions to this Report, with supporting briefs, are to be included in the Exceptions referenced in the order of Jan. 15, 1993. Such Exceptions must be received by the Clerk on or before 3:00pm, Monday March 15, 1993. Reply briefs, if any, are to be included the reply briefs referenced in the order of Jan. 15, 1993. Such reply briefs are to be filed with the Clerk and served upon opposing counsel on or before 3:00pm., Wednesday, April 7, 1993. Rule 29 does not apply. The case is set for oral argument during the session beginning April 19, 1993. Justice Souter took no part in the consideration or decision of this order.
Mar. 1, 1993	Record filed.
Mar. 15, 1993	Exceptions of intervenors United Illuminating Co., et al., to Report of Special Master filed.
Mar. 15, 1993	Exceptions of New Hampshire to Report of Special Master filed.
Mar. 16, 1993	CIRCULATED.
Mar. 19, 1993	Motion of Massachusetts for divided argument and for additional time for oral argument filed.
Mar. 22, 1993	Motion of intervenors United Illuminating Co., et al. for divided argument filed.
Mar. 26, 1993	Memorandum in support of motion of Massachusetts for divided argument and for additional time for oral argument by plaintiffs Connecticut and Rhode Island.
Apr. 5, 1993	**ORDER:** The motion of Massachusetts for divided argument and for additional time for oral argument is denied. The motion of intervenors United Illuminating Company, et al. for divided argument is granted to be divided as follows: 20 minutes for the plaintiffs and 10 minutes for the intervenors. Justice Souter took no part in the consideration or decision of these motions.
Apr. 6, 1993	Reply of Plaintiff States (CT, MA, RI) to Exceptions of New Hampshire.
Apr. 7, 1993	Reply brief for the State of New Hampshire filed.
Apr. 7, 1993	Reply brief for Intervenors filed.
Apr. 16, 1993	DISMISSED under Rule 46.

MOTION FILED
OCT 30 1991

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In The

Supreme Court Of The United States

October Term, 1991

STATE OF CONNECTICUT,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

Plaintiffs,

v.

STATE OF NEW HAMPSHIRE

Defendant

MOTION FOR LEAVE TO FILE COMPLAINT AND COMPLAINT

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October Term, 1991

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COMMONWEALTH OF MASSACHUSETTS,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

Plaintiffs,

v.

STATE OF NEW HAMPSHIRE

Defendant.

MOTION FOR LEAVE TO FILE COMPLAINT

Pursuant to Rule 17 of the Rules of the Supreme Court, the State of Connecticut, the Commonwealth of Massachusetts, and the State of Rhode Island and Providence Plantations, by their Attorneys General, ask leave of this Court to file the Complaint against the State of New Hampshire.

As is more fully set forth in the accompanying Brief in Support of Motion for Leave to File Complaint, the plaintiffs respectfully submit:

1. The State of New Hampshire has imposed a "Tax on Nuclear Station Property" (the "Seabrook Tax") and in the same

legislation, repealed the New Hampshire Franchise Tax formally imposed upon the gross receipts received from utilities selling electricity and also provided a credit to be applied against the New Hampshire Business Profits Tax for any tax paid under the new Seabrook Tax effectively causing virtually the entire burden of the Seabrook Tax to be borne by out-of-state consumers of electricity.

2. The economic impact of the Seabrook Tax on the plaintiff States and their citizens will exceed 14 million dollars annually.

3. The Seabrook Tax violates the rights and protections guaranteed to the plaintiff States and their citizens by the Constitution and statutes of the United States.

WHEREFORE, the plaintiff States respectfully request this Court grant their Motion for Leave to File Complaint.

Respectfully submitted,

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In The

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STATE OF CONNECTICUT,
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STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

Plaintiffs,

v.

STATE OF NEW HAMPSHIRE

Defendant.

COMPLAINT

The States of Connecticut and Rhode Island and the Commonwealth of Massachusetts bring this civil action for declaratory and injunctive relief against the State of New Hampshire, and complain and allege as follows:

JURISDICTION AND STANDING

1. The exclusive original jurisdiction of this Court is invoked under the Constitution of the United States, art. III, § 2, cl. 1 and 2 ("controversies between two or more States"), and 28 U.S.C. § 1251(a)(1) (1991). Plaintiffs have no other plain, speedy or adequate remedy at law.

2. This action seeks a declaratory judgment, pursuant to 28 U.S.C. §§ 2201-2202 (1991), that the State of New Hampshire's "Tax on Nuclear Station Property," 1991 N.H. Laws c. 354 (to be codified as New Hampshire Revised Statutes Annotated ("RSA") chapter 83-D) (hereinafter the "Seabrook Tax"), a copy of which is attached hereto as Exhibit A and incorporated herein by reference, violates the rights and protections afforded to plaintiffs by the United States Constitution under art. VI, cl. 2 (Supremacy Clause); art. I, § 8 (Commerce Clause); the Equal Protection Clause of the Fourteenth Amendment; and art. IV, § 2, cl. 1 (Privileges and Immunities Clause). This suit also seeks to enjoin permanently the enforcement of the Seabrook Tax.

3. The plaintiffs are the sovereign State of Connecticut, with its capital located in Hartford, Connecticut; the Commonwealth of Massachusetts, with its capital located in Boston, Massachusetts; and the State of Rhode Island, with its capital located in Providence, Rhode Island. Plaintiffs bring this action in their proprietary capacities as substantial purchasers of electricity from owners of the Seabrook Station, the only property to which the Tax on Nuclear Station Property applies. Plaintiffs also bring this action in their *parens patriae* or quasi-sovereign capacities, as guardians of the health, welfare, and economic prosperity of the citizens of their states.

4. The defendant is the sovereign State of New Hampshire, with its capital located in Concord, New Hampshire.

THE NEW HAMPSHIRE TAX

5. The Seabrook Tax makes three changes in New Hampshire's tax law. First, it imposes an ad valorem tax upon the value of nuclear station property at the rate of 0.64 percent of valuation to be assessed annually. Chapter 354:1 (H.B. 64, § 1) to be codified as RSA 83-D:1. Second, it amends New Hampshire's Franchise Tax to exclude electric utilities from

the definition of "public utility" and exclude sales of electricity from the Franchise Tax's coverage. Chapter 354:3 and 4 (H.B. 64, §§ 3 and 4), amending RSA 83-C:1, II and IV. Third, it allows electric utilities a credit against any liability they have under New Hampshire's Business Profits Tax to the extent of the amount paid by such entities pursuant to the Seabrook Tax. Chapter 354:2 (H.B. 64, § 2), amending RSA 77-A:5.

6. There is only one nuclear power station in New Hampshire, the Seabrook Station, and therefore only one property subject to the Seabrook Tax.

7. Seabrook Station is jointly owned by utilities and municipal electric cooperatives located in, or selling electricity directly or indirectly to consumers located in, the States of New Hampshire, Connecticut, Massachusetts, Rhode Island, and Vermont. Public Service Company of New Hampshire ("PSNH"), an electric utility located in New Hampshire, and making retail sales of electricity to New Hampshire customers, is the single largest owner of Seabrook Station, with a 35.6 percent share. Other New Hampshire utilities own a total of 2.17 percent of Seabrook Station. The United Illuminating Company and the Connecticut Light and Power Company, which are utilities located in Connecticut, and making retail sales of electricity exclusively to Connecticut customers, own 17.5 percent and 4.06 percent, respectively, of Seabrook Station. Utilities located within and/or selling electricity at retail to Massachusetts consumers own a total of 28.06 percent of Seabrook Station. Specifically, Massachusetts Municipal Wholesale Electric Cooperative owns 11.6 percent, New England Power Company owns 10 percent, Canal Electric Company owns 3.5 percent, Montaup Electric Company owns 2.9 percent, Taunton Municipal Lighting Plant owns 0.1 percent, and Hudson Light & Power owns 0.07 percent of Seabrook Station. EUA Power owns 12.13 percent of Seabrook. Although EUA Power is a New Hampshire corporation, it is strictly a wholesale generation company with no retail customers in New Hampshire. Utilities located in the

State of Vermont own the remaining 0.41% share.

Each of the Seabrook joint owners is engaged at the Seabrook Station in the generation or transmission of electricity in interstate commerce. The Federal Energy Regulatory Commission (FERC) regulates the wholesale sale of electricity between some of the Seabrook joint owners and their retail subsidiaries or other utilities. State regulatory authorities regulate certain retail sales of electricity by some of the joint owners.

8. The Seabrook Tax is imposed upon each entity with an ownership interest in Seabrook Station in the same proportion as that entity's ownership interest bears to the entirety of the total ownership of Seabrook Station property.

9. For 1991 the Seabrook Tax requires that Seabrook Station be valued at no more than $3,500,000,000 and that estimated tax payments be based on a valuation of $3,500,000,000. Based on this statutory valuation, the total liability to be paid to New Hampshire by the owners of Seabrook Station is $22,400,000 annually. For 1991, the tax is deemed to have been assessed as of April 1, 1991, with the first estimated tax payment due on September 15, 1991.

10. Prior to its amendment by the Seabrook Tax to exclude electric utilities, the New Hampshire Franchise Tax (hereinafter "Franchise Tax"), RSA 83-C:1 *et seq.*, had been imposed on public utilities at the rate of 1 percent of all gross receipts from the sale of gas or electricity within the State of New Hampshire pursuant to franchises granted by the state, generating approximately $6 million in tax revenue annually from New Hampshire corporations. Prior to the enactment of the Seabrook Tax, the Franchise Tax applied to the New Hampshire owners of Seabrook Station, but not to the owners selling electricity exclusively to out-of-state customers, since only the New Hampshire utilities received receipts from the sale of electricity pursuant to franchises granted by the State of New Hampshire. The Seabrook Tax wholly eliminated

the previously existing liability of New Hampshire electric utilities to pay the Franchise Tax.

11. Public Service of New Hampshire, the primary provider of electricity for New Hampshire, has been and continues to be subject to the New Hampshire Business Profits Tax. RSA 77-A:5. Part of the legislation creating the Seabrook Tax provides a dollar for dollar credit to be applied against this unrelated Business Profits Tax.

THE PURPOSE AND EFFECT OF THE SEABROOK TAX

12. The stated legislative purpose of the Seabrook Tax is to establish nuclear station property as "a distinct class of property," based upon findings that it is "the only property in the state that generates electricity from the fission of atoms," that such generation "imposes unique responsibilities on the state," that a nuclear generating station "creates special and unique public safety requirements and burdens" and "has a unique and lasting impact on the environment which creates burdens" on the state, and that taxation of such class of property is appropriate "to help defray the public charges of government." Chapter 354:1 (H.B. 64, § 1) (RSA 83-D:1).

13. Contrary to the expressed legislative finding, the Seabrook Tax is not necessary "to help defray" any governmental costs related to the presence of Seabrook Station in New Hampshire because all the specific costs attributable to nuclear generating stations, as compared to non-nuclear generating stations, with respect to environmental compliance, emergency planning, liability insurance, and decommissioning are already the responsibility of, and paid by, the owners of Seabrook Station pursuant to federal and New Hampshire law and regulations which pre-exist and are distinct from the Seabrook Tax.

14. The legislative history of the Seabrook Tax indicates

that the actual purpose of the Seabrook Tax is to raise additional revenues for the State of New Hampshire derived almost entirely from the owners of Seabrook Station which make retail sales of electricity to out-of-state consumers, and ultimately from those consumers themselves.

15. New Hampshire utilities selling electricity to New Hampshire consumers will pay at most a *de minimis* portion of the Seabrook Tax because of the exemption from the Franchise Tax and a dollar for dollar credit against the Business Profits Tax, while the owners of Seabrook which make retail sales of electricity to out-of-state consumers will bear the full burden of the tax.

16. The State of Connecticut, directly and through its political subdivisions and instrumentalities, is a major consumer of electricity purchased from utilities that are joint owners of Seabrook Station and subject to the Seabrook Tax.

17. Virtually all of the citizens of Connecticut are consumers of electricity purchased from utilities that are joint owners of Seabrook Station and subject to the Seabrook Tax.

18. The Commonwealth of Massachusetts, directly and through its political subdivisions and instrumentalities, is a major consumer of electricity purchased from utilities that are joint owners of Seabrook Station and subject to the Seabrook Tax.

19. The vast majority of the citizens of the Commonwealth of Massachusetts are consumers of electricity purchased from utilities that are joint owners of Seabrook Station and subject to the Seabrook Tax.

20. The State of Rhode Island, directly and through its political subdivisions and instrumentalities, is a major consumer of electricity purchased, directly or indirectly, from utilities that are joint owners of Seabrook Station and subject to the Seabrook Tax.

21. Virtually all of the citizens of the State of Rhode Island are consumers of electricity purchased directly or indirectly from utilities that are joint owners of Seabrook Station and subject to the Seabrook Tax.

22. The cost of the Seabrook Tax will be passed on to customers of these utilities, including the States of Connecticut and Rhode Island and the Commonwealth of Massachusetts and their citizens as consumers of substantial amounts of electricity, in the form of higher rates, and will impose economic hardships and burdens directly on the plaintiff States and their citizens.

23. The total direct economic cost of the Seabrook Tax on plaintiff States, their instrumentalities, and their citizens is estimated to be approximately $14,000,000 during the first year of the tax and over $500,000,000 over the life of Seabrook Station.

FIRST CAUSE OF ACTION

24. The plaintiffs reallege, as though set forth in full, the allegations contained in Paragraphs 1 through 23.

25. The Seabrook Tax is in conflict with and repugnant to federal law and is accordingly void under the Supremacy Clause, art. VI of the United States Constitution.

26. The Seabrook Tax is a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-state manufacturers, producers, wholesalers, retailers, or consumers of that electricity. As such, the tax is in conflict with the Tax Reform Act of 1976, Pub. L. 94-455, § 212(a) 90 Stat. 1914, codified at 15 U.S.C. § 391 which provides:

Tax on or with respect to generation or transmission of electricity

No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

The greatly disproportionate burden borne ultimately by non-New Hampshire consumers is discrimination which is barred by Congress under this federal law.

SECOND CAUSE OF ACTION

27. Plaintiffs reallege, as though set forth in full, the allegations contained in Paragraphs 1 through 23.

28. The generation and sale of electricity are commercial activities in interstate commerce.

29. The Seabrook Tax constitutes an unreasonable, unlawful and prohibited burden on interstate commerce, in contravention of art. I, § 8, cl. 3 of the United States Constitution (Commerce Clause) in that:

A. The Seabrook Tax along with the concurrently enacted credits to another New Hampshire tax and the repeal of the New Hampshire Franchise Tax on electric utilities discriminates against the utilities which are part owners of Seabrook and which sell electricity at retail to non-New Hampshire customers. The burden of this tax will ultimately be borne disproportionately by non-New Hampshire consumers, and thus

this tax will provide substantial and direct commercial advantage to local businesses and consumers.

B. The Seabrook Tax is not a property tax to be borne proportionately by the owners of the taxable property. Through the utilization of the credit provision for the New Hampshire Business Profits Tax and the repeal of the New Hampshire Franchise Tax on electric utilities, the Seabrook Tax is unfairly and therefore unconstitutionally apportioned.

C. The Seabrook Tax is not fairly related to the services provided by New Hampshire. The stated legislative purpose of the Seabrook Tax (RSA 83-D:1) does not justify the tax. Under New Hampshire and federal law, all of the costs of environmental compliance, emergency planning, liability insurance, and decommissioning have been accounted for by the owner-operators of the Seabrook plant. The Seabrook Tax cannot be justified for these purposes and is not fairly related to any benefits provided the taxpayer.

THIRD CAUSE OF ACTION

30. The plaintiffs reallege, as though set forth in full, the allegations contained in Paragraphs 1 through 23.

31. The Seabrook Tax deprives the plaintiffs and their citizens of the equal protection of the law as guaranteed under the Fourteenth Amendment to the United States Constitution.

32. There is no rational basis for the classification established by the Seabrook Tax which results in preferential tax treatment for New Hampshire electric utilities selling electricity at retail to New Hampshire customers, and benefits for New Hampshire citizens at the expense of the plaintiff States and its citizens.

FOURTH CAUSE OF ACTION

33. Plaintiffs reallege, as though set forth in full, the allegations contained in Paragraphs 1 through 23.

34. The Seabrook Tax contravenes and violates art. IV, § 2, cl. 1 (the Privileges and Immunities Clause of the United States Constitution) which provides in pertinent part that:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

35. The enactment of the Seabrook Tax, along with the elimination of the New Hampshire Franchise Tax on electric companies and allowance of any payment made pursuant to this tax as a credit against another New Hampshire tax, creates significant benefits for the citizens of New Hampshire, while treating non-New Hampshire ratepayers and citizens substantially different.

WHEREFORE, plaintiffs respectfully pray that this Court:

(a) Declare and adjudge, pursuant to 28 U.S.C. § 2201 (1991), that the New Hampshire Tax on Nuclear Station Property is unconstitutional and unenforceable;

(b) Issue a permanent injunction prohibiting the defendant, its agents and employees from collecting the New Hampshire Tax on Nuclear Station Property;

(c) Issue a preliminary injunction, pending the final determination of this case, prohibiting the defendant, its agents and employees from collecting the New Hampshire Tax on Nuclear Station Property; or in the alternative, order that all revenue collected pursuant to the New Hampshire Tax on Nuclear Station Property be placed in an escrow account and the funds not be expended;

(d) Grant plaintiffs their costs herein expended and such other relief as the Court may deem just and proper.

Respectfully submitted,

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EXHIBIT A TO COMPLAINT

EXHIBIT A
1991 New Hampshire Laws Chapter 354

CHAPTER 354 (HB 64)

AN ACT RELATIVE TO THE BUSINESS PROFITS TAX, THE REAL ESTATE TRANSFER TAX, THE COMMUNICATION SERVICES TAX, RELATIVE TO ESTABLISHING A TAX ON NUCLEAR STATION PROPERTY AND MAKING AN APPROPRIATION THEREFOR, AND APPROPRIATING FUNDS FOR A TAX EXPENDITURE REPORT.

Be it Enacted by the Senate and House of Representatives in General Court convened:

354:1 New Chapter; Tax on Nuclear Station Property. Amend RSA by inserting after chapter 83-C the following new chapter:

CHAPTER 83-D

TAX ON NUCLEAR STATION PROPERTY

83-D:1 Declaration of Purpose and Findings. The general court finds:

I. Nuclear station property is the only property in the state that generates electricity from the fission of atoms.

II. Creating electricity from the fission of atoms imposes unique responsibilities on the state.

III. A nuclear station creates special and unique public safety requirements and burdens on the state.

IV. A nuclear station has a unique and long lasting impact on the environment which creates burdens on the state.

V. Accordingly, in the exercise of authority under part II, article 6 of the constitution of New Hampshire, the general court concludes that nuclear station property constitutes a distinct class of property that is appropriately subject to taxation as such by the state, to help defray the public charges of government, as provided in this chapter.

83-D:2 Nuclear Station Property Defined. For the purposes of this chapter, nuclear station property means the land, buildings, structures, tunnels, machinery, dynamos, apparatus, poles, wires, nuclear fuel and fixtures of all kinds and descriptions used in generating, producing, supplying and distributing electric power or light from the fission of atoms, exclusive of transmission lines.

83-D:3 Tax Imposed. A tax is imposed upon the value of nuclear station property at the rate of .64 percent of valuation, to be assessed annually as of April 1 and paid in accordance with this chapter.

83-D:4 Valuation. The commissioner of revenue administration shall determine the valuation of nuclear station property. For the purposes of this chapter, the commissioner shall appraise nuclear station property using the standard established pursuant to RSA 75:1.

83-D:5 Persons Liable. The tax imposed by this chapter shall be assessed upon each person with an ownership interest in nuclear station property, in the proportion that such person's ownership interest bears to the entirety of the ownership in the property.

83-D:6 Application of Credit. If the person liable for the tax imposed by this chapter is a member of a unitary business within the meaning of RSA 77-A:1, XIV, then the entire amount of the tax due under this chapter shall be allowed as a credit pursuant to RSA 77-A:5, VI, against the tax liability of such unitary business under RSA 77-A.

83-D:7 Returns and Declarations.

I. On or before January 15 each year, each person shall file with the commissioner of revenue administration, on a form prescribed by the commissioner, a return based on the valuation for April 1 of the prior year. The return shall be accompanied by the payment of such amount as has not been prepaid in accordance with paragraph III of this section. If the return shows an additional amount to be due, such additional amount is due and payable at the time the return is filed. If such return shows an overpayment of the tax due, a credit against a subsequent payment or payments due, to the extent of the overpayment, shall be allowed.

II. On or before April 15 of each year, each person liable to pay the tax imposed by this chapter shall file with the commissioner, on a form prescribed by the commissioner, a statement setting forth the amount of its ownership interest as of April 1. The statement shall include such additional information as the commissioner shall require and shall be signed by an authorized representative, subject to the pains and penalties of perjury. The statement shall be accompanied by the payment of such amount as has not been prepaid in accordance with paragraph III of this section.

III. At the time the statement required by paragraph II is filed, each person liable for the tax shall, in addition, file a declaration of the estimated tax to be assessed as of April 1 in the current calendar year, based on the tax assessed for the preceding calendar year, accompanied by payment of ¼ of the estimated tax due. Additional payments of ¼ of the estimated tax shall be made on June 15, September 15 and December 15.

IV. As of June 1 of each year the principal owner of a nuclear station shall file a list of the changes made to the nuclear station property since the prior April 1. This statement shall include such additional information as the commissioner shall require and shall be signed by an authorized

representative, subject to the pains and penalties of perjury.

V. Taxes and estimated taxes not paid when due shall be subject to appropriate penalties and interest under RSA 21-J.

83-D:8 Records.

I. Every person liable for tax under RSA 83-D:5 shall:

(a) Keep such records as may be necessary to determine the amount of his liability under this chapter.

(b) Preserve such records for the period of at least 3 years or until any litigation or prosecution under this chapter is finally determined.

(c) Make such records available for inspection by the commissioner of revenue administration or his authorized agents, upon demand, at reasonable times during regular business hours.

II. Whoever violates any of the provisions of this section shall be guilty of a misdemeanor if a natural person, or guilty of a felony if any other person.

83-D:9 Tax Payable for 1991. For the calendar year 1991, the tax imposed by this chapter shall be deemed to have been assessed as of April 1, 1991. For purposes of such assessment, the valuation of nuclear station property shall not exceed $3,500,000,000. No later than 30 days after the effective date of this chapter, each person liable for the tax shall file with the commissioner of revenue administration a statement setting forth the amount of the person's ownership interest and a list of the changes made to the nuclear station property since the prior April 1. Payments of estimated tax are due on September 15 and December 15, 1991. Liability for the tax payable for 1991 is limited to ½ of the amount that would otherwise be due. For purposes of this section, estimated tax

payments shall be based upon a valuation of nuclear station property equal to $3,500,000,000. Any overpayment or underpayment under RSA 83-D, by a person defined in RSA 83-D:5, shall be reconciled pursuant to RSA 83-D:7, I.

83-D:10 Adjustments; Procedure. The commissioner of revenue administration is empowered to determine whether there has been error in the assessment of the tax imposed by RSA 83-D:3 in accordance with the following provisions:

I. The person may demand such a determination in writing, within 30 days after the tax was due.

II. After hearing, if requested by the person, the commissioner shall affirm or shall increase or decrease the tax assessed. Any increase ordered by the commissioner shall be assessed against the person and shall carry interest as prescribed in RSA 21-J:28. Any decrease ordered by the commissioner shall, with interest pursuant to RSA 21-J:28 from the date the tax was paid, be credited against any unpaid tax then due from the person, and any balance due the person shall be certified to the state treasurer who shall pay the balance to the person. Such credit and payment together shall not exceed the amount of the tax originally paid.

83-D:11 Appeal. Within 30 days after notice of any adjustment of tax by the commissioner of revenue administration under RSA 83-D:10, a person may appeal the commissioner's determination either by written application to the board of tax and land appeals or by petition to the superior court in the county in which the person has a place of business or resident agent. The board of tax and land appeals or the superior court, as the case may be, shall determine the correctness of the commissioner's action de novo.

83-D:12 Administration.

I. The commissioner of revenue administration shall col-

lect the taxes, interest, additions to ~~tax and~~ penalties imposed under this chapter. The commissioner shall determine the expense of administration of this chapter and shall certify and pay over to the state treasurer the amount of remaining balance of the funds collected under this chapter after the expenses of administration have been deducted.

II. The commissioner shall adopt rules, pursuant to RSA 541-A, relative to:

(a) The administration of the tax imposed under RSA 83-D:3; and

(b) The recovery of any tax, interest on tax, or penalties imposed by RSA 83-D.

III. The commissioner may institute actions in the name of the state to recover any tax, interest on tax, additions to tax or the penalties imposed by this chapter.

IV. In the collection of the tax imposed by this chapter, the commissioner may use all of the powers granted to tax collectors under RSA 80 for the collection of taxes, except that the tax imposed by this chapter shall not take precedence over prior recorded mortgages. The commissioner shall also have all of the duties imposed upon the tax collectors by RSA 80 that are applicable to him. The provisions of RSA 80:26 shall apply to the sale of land for the payment of taxes due under this chapter, and the state treasurer is authorized to purchase the land for the state. If the state purchases the land, the state treasurer shall certify the purchase to the governor, and the governor shall draw his warrant for the purchase price out of any money in the treasury not otherwise appropriated.

V. The commissioner may take the oath of any person in the course of any hearing authorized under RSA 83-D:10, II. In connection with hearings, the commissioner and taxpayer have the power to compel attendance of witnesses and the production of books, records, papers, vouchers, accounts

or other documents. The commissioner and taxpayer may take the depositions of witnesses residing within or without the state pertaining to any matter under this chapter, in the same way as depositions of witnesses are taken in civil actions in the superior court. Fees of witnesses shall be the same as those allowed to witnesses in the superior court and in the case of witnesses summoned by the commissioner shall be considered as an expense of administration of this chapter.

VI. Any notice required by this chapter to be given by the commissioner to a taxpayer shall be made by first class mail to the last known address of the taxpayer, but in the case of hearings, notice shall be given at least 10 days before the date of the hearing and by certified mail.

354:2 Business Profits Tax; Credit Allowed for Tax on Nuclear Station Property. Amend RSA 77-A:5 by inserting after paragraph V the following new paragraph:

VI. Taxes paid pursuant to RSA 83-D.

354:3 Franchise Tax; Public Utility Redefined. Amend RSA 83-C:1, II to read as follows:

II. "Public utility" means every person, partnership, association and corporation except municipal corporation, engaged within this state in the manufacture, generation, distribution, transmission, or sale of gas.

354:4 Franchise Tax; Gross Receipts Redefined. Amend RSA 83-C:1, IV to read as follows:

IV. "Gross receipts" means all receipts received or accrued of the public utility from the sale of gas pursuant to franchises granted by this state. Gross receipts do not include receipts from sales of gas for use outside the state, or receipts from sales of gas to another public utility which is also subject to the payment of this tax.

354:5 Appropriation. The sum of $19,091 for the fiscal year ending June 30, 1992, and the sum of $14,693 for the fiscal year ending June 30, 1993, are hereby appropriated to the department of revenue administration for the purpose of administering the tax imposed in section 1 of this act. These sums shall be in addition to any other funds appropriated to the department of revenue administration. The governor is authorized to draw his warrant for said sums out of any money in the treasury not otherwise appropriated.

354:6 New Paragraphs; Compensation and Eligible Employee Defined. Amend RSA 77-A:1 by inserting after paragraph XXI the following new paragraphs:

XXII. "Compensation," for the purposes of RSA 77-A:5, VII, means all wages, salaries, fees, bonuses, commissions, or other items, including the following employee benefits: health, life and disability insurance and pensions, profit sharing and retirement benefits.

XXIII. "Eligible employee" means any individual employed by a business organization who, as of the last day of the applicable tax year:

(a) Has been employed by such business organization for at least 6 consecutive months;

(b) Has not been an eligible employee of such business organization or a substantially similar predecessor business organization for any prior taxable year; and

(c) Performs all but an incidental portion of services at a location or locations within the state. For the first taxable year in which the job creation tax credit allowed under RSA 77-A:5, VII, is effective, no employees employed on the first day of such taxable year shall be treated as eligible employees of such business organization for such first taxable year or any succeeding taxable year. For purposes of this paragraph, the commissioner is authorized to adopt rules pursuant

to RSA 541-A to define the terms "substantially similar predecessor business organization" and "incidental portion of services."

354:7 Factors Used in Apportionment; Apportionment Factors Adjusted. Amend the introductory paragraph of RSA 77-A:3, II(a) to read as follows:

II.(a) A fraction, the numerator of which shall be the property factor in subparagraph I(a) plus the compensation factor in subparagraph I(b) plus 1.5 multiplied by the sales factor in subparagraph I(c) and the denominator of which is 3.5, shall be applied to the total gross business profits (less foreign dividends) of the business organization to ascertain its gross business profits in this state. If this method of apportionment does not fairly represent the business organization's business activity in this state, the business organization may petition for, or the commission may require, in respect to all or any part of the business organization's business activity, if reasonable:

354:8 Determining Reasonable Compensation. Amend RSA 77-A:4, III to read as follows:

III.(a) In the case of a proprietorship or partnership, a deduction equal to a fair and reasonable compensation for the personal services of the proprietor or partners actually devoting time and effort in the operation of the business organization. The purpose of this paragraph is to permit deduction from gross business profits of a proprietorship or partnership only of such amounts as are fairly attributable to the personal services of the proprietor or partners who are natural persons, but not to permit deduction of any amounts as are fairly attributable to a return on business assets or the labor of non-owner employees of the business organization. The burden shall be upon the business organization filing the return to demonstrate the reasonableness of a deduction claimed under this paragraph, by a preponderance of the evidence. In considering the reasonableness of a deduction claimed under this paragraph, the commissioner shall consider the claimed deduc-

tion in light of compensation for personal services of employees in positions requiring similar responsibility, devotion of time, education and experience in business organizations of similar size, volume and complexity. In addition, the commissioner shall take into account the value to the business organization of the labor of its non-owner employees, and the use of the business assets of the business organization and any other factor which may reasonably assist the commissioner in making a determination as to the reasonableness of the claimed deduction.

(b) The amount of any deduction claimed under subparagraph (a) shall not exceed the amount reported as earned income from the activities of the business organization as reflected on the federal income tax returns of the proprietor or partner rendering such personal services, but may also include an amount not to exceed net rental income as compensation for operating rental property, and an amount not to exceed 15 percent of the gross selling price as commissions on the sale of business assets. Provided, that subject to the preceding sentence, a minimum deduction of $6,000 shall be allowed on account of the proprietor or each partner who is a natural person actually devoting time and effort to the operation of the business organization.

354:9 Total Amount of Credit Allowed. Amend the unnumbered concluding paragraph of RSA 77-A:5 to read as follows:

Provided, that the total amount of any credits allowable under this section shall not exceed the tax due under this chapter.

354:10 New Paragraphs; Credits for Job Creation and Capital Expenditures. Amend RSA 77-A:5 by inserting after paragraph VI the following new paragraphs:

VII. There shall be allowed a job creation tax credit equal to 15 percent of the compensation, as defined in RSA 77-A:1, XXII, paid during the taxable period to eligible employees, as defined in RSA 77-A:1 XXIII, provided, however, that in no event shall the total number of eligible employees for which the tax credit is taken exceed the increase in the total number of employees from the previous tax period to the current tax period. In the event that the excess of (a) the total number of employees in New Hampshire on the last day of the current taxable period over (b) the total number of employees in New Hampshire on the last day of the previous tax period is less than the total number of eligible employees for the current taxable period, then the total amount of compensation for which a credit may be taken shall equal such excess multiplied by the average compensation of such eligible employees. Furthermore, the total credit allowed under this paragraph shall not exceed 5 percent of the tax due under this chapter before any credits under RSA 77-A:5 are taken into account. The job creation tax credit allowed under this paragraph shall take effect July 1, 1992, and shall apply to returns and taxes due on account of taxable periods ending on or after July 1, 1992, for a period of 5 years only. The job creation tax credit allowed under this paragraph shall not be allowed for taxable periods ending on or after July 1, 1997.

VIII. In the case of a business organization which is eligible for a tax deduction for capital expenditures under section 179 of the United States Internal Revenue Code as defined in RSA 77-A:1, XX, an amount equal to 10 percent of:

(a) That portion of the cost of section 179 property situated in this state: or

(b) In the case of a taxpayer which apportions its gross business profits under RSA 77-A:3, that portion of the cost of section 179 property included in the numerator pursuant to RSA 77-A:3, II(a).

Provided, that a credit shall not be allowed for any portion of the cost of section 179 property for which an election has been taken under section 179(a) of the United States In-

ternal Revenue Code as defined in RSA 77-A:1, XX, and that in no event shall the credit allowed under this paragraph exceed 5 percent of the tax due under this chapter before any credits under RSA 77-A:5 are taken into account, and provided further, that the credit allowed under this paragraph for capital expenditures shall take effect July 1, 1991, and shall apply to returns and taxes due on account of taxable periods ending on or after July 1, 1991, but only with respect to capital expenditures incurred on or after July 1, 1991, for a period of 5 years only. The credit allowed under this paragraph for capital expenditures shall not be allowed for taxable periods ending on or after July 1, 1996.

354:11 Rate of Tax for Biennium Ending June 30, 1993, Real Estate Transfer Tax. Notwithstanding the provisions of RSA 78-B:1, I and 1989, 416:4, for the period beginning July 1, 1991, and ending June 30, 1993, the rate of the tax is $.525 per $100, or fractional part thereof, of the price or consideration for such sale, grant or transfer; except that where the price or consideration is $4,000 or less there shall be a minimum tax of $21. The tax imposed shall be computed to the nearest whole dollar.

354:12 Rate of Tax for Biennium Ending June 30, 1993, Meals and Rooms Tax. Notwithstanding the provisions of RSA 78-A, the tax imposed under RSA 78-A:6 shall be imposed as follows for the period beginning July 1, 1991, and ending June 30, 1993:

I. A tax of 8 percent of the rent is imposed upon each occupancy.

II. A tax is imposed on taxable meals based upon the charge therefor as follows:

(a) Three cents for a charge between $.36 and $.37 inclusive;
(b) Four cents for a charge between $.38 and $.50 inclusive;

(c) Five cents for a charge between $.51 and $.62 inclusive;
(d) Six cents for a charge between $.63 and $.75 inclusive;
(e) Seven cents for a charge between $.76 and $.87 inclusive;
(f) Eight cents for a charge between $.88 and $1.00 inclusive;
(g) Eight percent of the charge for taxable meals over $1.00, provided that fractions of cents shall be rounded up to the next whole cent.

354:13 Rate of Tax for Biennium Ending June 30, 1993, Communications Services Tax. For the period beginning July 1, 1991, and ending June 30, 1993, there is imposed a surcharge of 100 percent on the tax imposed under RSA 82-A:3 and 82-A:4 on the gross charge for communications services purchased at retail from a retailer.

354:14 New Section; Tax Expenditure Report. Amend RSA 77-A by inserting after section 5 the following new section:

77-A:5-a Tax Expenditure Report. On or before February 1 of every calendar year the commissioner shall certify to the general court and the governor an analysis of each of the past year's credits allowed under RSA 77-A, RSA 83-C, RSA 83-D, RSA 84, and RSA 400-A against the business profits tax imposed by this chapter.

354:15 New Sections; Application of Credit. Amend RSA 84 by inserting after section 24 the following new sections:

84:25 Application of Credit. If the bank or corporation liable for taxes imposed by this chapter is a member of a unitary business within the meaning of RSA 77-A:1, XIV, then the entire amount of the taxes due under this chapter by the individual member of such unitary business shall be allowed as a credit pursuant to RSA 77-A:5, II, against such individual member's portion of the total tax liability of the unitary

business under RSA 77-A. In the event that the individual member's credit exceeds such member's portion of the total tax liability of the unitary business, the excess of such credit shall be allowed as a credit against any other individual member's tax liability under RSA 77-A, provided such other member is also subject to the tax imposed by this chapter. The commissioner of revenue administration shall adopt rules, in accordance with RSA 541-A, to determine an individual member's portion of the total tax liability based upon each member's activity within New Hampshire.

84:26 Application of Credit to Certain New Hampshire Banks and Bank Holding Companies. Notwithstanding the provisions of RSA 84:25, any New Hampshire bank or New Hampshire bank holding company which has been subject to resolution by the state banking department or federal bank regulators during fiscal year 1992 or fiscal year 1993 shall be permitted to transfer any credit for taxes paid under this chapter during such fiscal year period to any acquiring New Hampshire business organization to be used against such acquiring business organization's tax liability under RSA 77-A. The banking commissioner and the commissioner of revenue administration may adopt rules, pursuant to RSA 541-A, to implement the provisions of this section.

354:16 Technical Correction. Amend the introductory paragraph of RSA 77-A:3, I to read as follows:

I. A business organization which derives gross business profits from business activity both within and without this state, and which is subject to a net income tax, a franchise tax measured by net income, or a capital stock tax in another state or is subject to the jurisdiction of another state to impose a net income tax or capital stock tax upon it, whether or not such tax is actually imposed, shall apportion its gross business profits so as to allocate to this state a fair and equitable proportion of such business profits. Except as provided in this section, such apportionment shall be made on the basis of the following 3 factors:

354:17 New Paragraph; Application of Credit. Amend RSA 400-A:32 by inserting after paragraph IV the following new paragraph:

V. If the insurer liable for the taxes imposed in paragraphs I and II of this section is a member of a unitary business within the meaning of RSA 77-A:1, XIV, then the entire amount of the taxes due under this chapter by the individual member of such unitary business shall be allowed as a credit pursuant to RSA 77-A:5, III, against such individual member's portion of the total tax liability of the unitary business under RSA 77-A. In the event that the individual member's credit exceeds such member's portion of the total tax liability of the unitary business, the excess of such credit shall be allowed as a credit against any other individual member's tax liability under RSA 77-A, provided such other member is also subject to the tax imposed by this chapter. The commissioner of revenue administration shall adopt rules, in accordance with RSA 541-A, to determine an individual member's portion of the total tax liability based upon each member's activity within New Hampshire.

354:18 Appropriation. The sum of $100,000 for the biennium ending June 30, 1993, is hereby appropriated to the department of revenue administration for the purpose of administering the tax expenditure report authorized in section 14 of this act. This sum shall be in addition to any other funds appropriated to the department of revenue administration. The governor is authorized to draw his warrant for said sums out of any money in the treasury not otherwise appropriated.

354:19 Nonseverability. It is the intent of the legislature that sections 1 and 2 of this act be considered a unit and their provisions inseparable. If any provision of sections 1 and 2 of this act is declared unconstitutional, then sections 1 and 2 and all of their provisions shall be invalid.

354:20 Severability. Except as provided in section 19, if

any provision of this act or the application thereof to any person or circumstance is held to be invalid, the invalidity shall not affect any other provision or the application of such provision to other persons or circumstances, and to this end the provisions of this act are severable.

354:21 Effective Date.

I. Sections 1-5 and 11-12 of this act shall take effect July 1, 1991.

II. Section 13 of this act shall take effect for gross charges collected from the taxpayer by a retailer on or after August 1, 1991, for communications services purchased at retail on or after July 1, 1991.

III. Section 8 of this act shall take effect July 1, 1991, and shall apply to returns and taxes due on account of taxable periods ending on or after January 1, 1991.

IV. Section 9 of this act shall take effect July 1, 1991, and shall apply to returns and taxes due on account of taxable periods ending on or after July 1, 1991.

V. Section 6 and the provisions of RSA 77-A:5, VII as inserted by section 10 of this act shall take effect July 1, 1992, and shall apply to returns and taxes due on account of taxable periods ending on or after July 1, 1992.

VI. Sections 7 and 16 of this act shall take effect January 1, 1992, and section 7 shall apply to returns and taxes due on account of taxable periods ending on or after December 31, 1991.

VII. The provisions of RSA 77-A:5, VIII as inserted by section 10 of this act shall take effect July 1, 1991, and shall apply to returns and taxes due on account of taxable periods ending on or after July 1, 1991, but only with respect to capital expenditures incurred on or after July 1, 1991.

VIII. Sections 15 and 17 of this act shall take effect on July 1, 1991 and shall apply to taxes and returns due on account of taxable periods ending on or after July 1, 1991.

IX. The remainder of this act shall take effect upon its passage.

[Approved July 2, 1991.]

[**Effective Date** I. Sections 1-5 and 11-12 of this act shall take effect July 1, 1991. II. Section 13 of this act shall take effect for gross charges collected from the taxpayer by a retailer on or after August 1, 1991, for communications services purchased at retail on or after July 1, 1991. III. Section 8 of this act shall take effect July 1, 1991, and shall apply to returns and taxes due on account of taxable periods ending on or after January 1, 1991. IV. Section 9 of this act shall take effect July 1, 1991, and shall apply to returns and taxes due on account of taxable periods ending on or after July 1, 1991. V. Section 6 and the provisions of RSA 77-A:5, VII as inserted by section 10 of this act shall take effect July 1, 1992, and shall apply to returns and taxes due on account of taxable periods ending on or after July 1, 1992. VI Sections 7 and 16 of this act shall take effect January 1, 1992, and section 7 shall apply to returns and taxes due on account of taxable periods ending on or after December 31, 1991. VII. The provisions of RSA 77-A:5, VIII as inserted by section 10 of this act shall take effect July 1, 1991, and shall apply to returns and taxes due on account of taxable periods ending on or after July 1, 1991, but only with respect to capital expenditures incurred on or after July 1, 1991. VIII. Sections 15 and 17 of this act shall take effect on July 1, 1991 and shall apply to taxes and returns due on account of taxable periods ending on or after July 1, 1991. IX. The remainder of this act shall take effect July 2, 1991.]

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No. _____, Original

In The

Supreme Court Of The United States

October Term, 1991

STATE OF CONNECTICUT,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

Plaintiffs,

v.

STATE OF NEW HAMPSHIRE

Defendant.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

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In The

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October Term, 1991

STATE OF CONNECTICUT,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

Plaintiffs,

v.

STATE OF NEW HAMPSHIRE

Defendant.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

INTRODUCTION

The States of Connecticut and Rhode Island and the Commonwealth of Massachusetts challenge the New Hampshire Nuclear Station Property Tax, 1991 N.H. Laws c. 354, the "Seabrook Tax." The tax is purportedly imposed on the nuclear property of all utilities which generate electricity in New Hampshire and sell it in New Hampshire and the plaintiff States, but the ultimate economic burden is designed to fall almost entirely on non-New Hampshire consumers of electricity, while almost completely exempting New Hampshire

consumers from its burden. The tax has increased or will eventually increase the costs of electricity for the plaintiff States and their citizens by placing a discriminatory tax burden on electricity sold to them.

Plaintiffs claim that the tax violates the Supremacy, Commerce, Equal Protection and Privileges and Immunities Clauses of the United States Constitution, and 15 U.S.C. § 391, which bars taxes which "discriminate[] against out-of-state . . . producers . . . or consumers of electricity." Plaintiffs claim that by imposing a tax on owners of "nuclear station property" and concurrently repealing the "Franchise Tax" on gross receipts from retail sales of electricity in New Hampshire, and allowing the full amount of the tax to be credited against such owner's liability for "Business Profits Tax" (in a manner which can be expected to benefit New Hampshire consumers in a grossly disproportionate fashion, relative to out-of-state consumers), New Hampshire has effectively protected its own residents from the impact of the tax and has exported nearly the entire burden of the tax to consumers living in the neighboring plaintiff States. For the reasons set forth in this brief, this case falls squarely within the Supreme Court's original jurisdiction, and the Court should grant plaintiffs' motion for leave to file their complaint.

JURISDICTION

The States of Connecticut and Rhode Island and the Commonwealth of Massachusetts by this action challenge the constitutionality of the New Hampshire Seabrook Tax.

This controversy between the States of Connecticut, Massachusetts, and Rhode Island and the State of New Hampshire is within the original and exclusive jurisdiction of this Court under article III, section 2, clauses 1 and 2 of the Constitution of the United States and 62 Stat. 927, Title 28, United States Code, Section 1251(a)(1) (1976).

QUESTION PRESENTED

Whether a challenge by the plaintiff States to the constitutionality of the New Hampshire Seabrook Tax, which by operation and design imposes a discriminatory burden on out-of-state consumers of electricity, presents an appropriate case for this Court's exercise of its exclusive and original jurisdiction, where plaintiffs present facts which establish that:

I. The Seabrook Tax violates the Supremacy Clause of the United States Constitution in that it "discriminates against out-of-state manufacturers, producers, wholesalers, retailers, or consumers of electricity" in violation of 15 U.S.C. § 391.

II. The Seabrook Tax places an unconstitutional, discriminatory burden upon interstate commerce.

III. The Seabrook Tax denies equal protection of the laws.

IV. The Seabrook Tax violates the Privileges and Immunities Clause of the United States Constitution.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Article I, section 8, clause 3 of the Constitution of the United States provides as follows:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes.

Article VI, clause 2 of the Constitution of the United States provides as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the

> Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Article III, section 2, clause 3 of the Constitution of the United States provides as follows:

> In all Cases . . . in which a State shall be a Party, the supreme Court shall have original Jurisdiction.

Section 1 of the fourteenth amendment to the Constitution of the United States provides as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article IV, section 2, clause 1 of the Constitution of the United States provides as follows:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the Several States.

Title 28 U.S.C. § 1251(a) provides:

> (a) The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

Title 15 U.S.C. § 391 provides as follows:

> **Tax on or with respect to generation or transmission of electricity.** No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which

> discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

Title 16 U.S.C. § 824, of the Federal Power Act, is contained in full in the Addendum to this brief.

Title 42 U.S.C. §§ 2011, 2012, 2013, of the Atomic Energy Act, are contained in full in the Addendum to this brief.

New Hampshire's "Tax on Nuclear Station Property," (the "Seabrook Tax"), Chapter 354 (H.B. 64 § 1) of the 1991 New Hampshire Laws, is set out in full in Exhibit A to the accompanying Complaint and in the Addendum to this brief and is codified as New Hampshire Rev. Stat. Ann. 83-D.

New Hampshire's "Business Profits Tax," New Hamp. Rev. Stat. Ann. 77-A:5, prior to amendment by Chapter 354 (H.B. 64 § 2) of 1991 New Hampshire Laws, is contained in the Addendum to this brief.

New Hampshire's "Franchise Tax," New Hamp. Rev. Stat. Ann. 83-C:1, prior to amendment by Chapter 354 (H.B. 64 §§ 3 and 4) of 1991 New Hampshire Laws, is contained in the Addendum to this brief.

Conn. Gen. Stat. § 16-19 is contained in the Addendum to this brief.

Conn. Gen. Stat. § 16-19a is contained in the Addendum to this brief.

Mass. Gen. Laws c. 164, §§ 94 and 94G are contained in the Addendum to this brief.

STATEMENT

This is a suit to set aside on constitutional grounds New Hampshire's "Tax on Nuclear Station Property" contained in Chapter 354 (H.B. 64) entitled "An Act relative to establishing a tax on nuclear station property and making an appropriation therefor," §§ 1, 2, 3, 4, 19, 20 and 21.[1] The intent and effect of this tax is that its burden will fall almost entirely on out-of-state consumers, while insulating New Hampshire consumers from its burden.

Effective July 1, 1991, the State of New Hampshire imposed a property tax on nuclear power station property at the rate of 0.64% of the property's valuation, to be assessed annually. RSA 83-D:3; RSA 83-D:4. Since the only nuclear power station in New Hampshire is the Seabrook Station in Seabrook, New Hampshire ("Seabrook Station"), it is the only property subject to the Seabrook Tax. The majority of Seabrook Station, or 62.23%, is owned by power companies making no retail sales in New Hampshire, with the remaining 37.77% owned by New Hampshire retail power companies.[2]

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[1] Chapter 354 (H.B. 64-FN-A) (1991) amended the Revised Statutes Annotated (RSA) of New Hampshire by creating a new chapter, 83-D, and in concert amended existing chapters 77-A and 83-C. References throughout this brief will be to the RSA citations as contained in Chapter 354 which is attached as Exhibit A to the accompanying Complaint and in the Addendum to this brief.

[2] In accordance with and in furtherance of national policy regarding the development and peaceful use of atomic energy, as enunciated in the Atomic Energy Act of 1954 and preceding legislation, codified in 42 U.S.C. § 2011 *et seq.*, in May of 1973, electrical utility companies throughout New England ("joint owners") joined together to construct and operate two identical 1150 megawatt nuclear powered generating plants in Seabrook, New Hampshire. Ultimately, only one such generating plant (Seabrook Station) was constructed and is in operation. Pursuant to a joint ownership agreement, each of the joint owners owned, as tenants-in-common, an undivided fractional interest in the Seabrook Station. The joint owners shared and continue to share the total cost and expense of constructing and operating the Seabrook Station in accordance with their respective proportion-

(continued)

Each of the joint owners is engaged at the Seabrook Station in the generation or transmission of electricity in interstate commerce. These joint owners are members of the New England Power Pool ("NEPOOL"), a regional power pool which includes a network of electric generating units and transmission lines throughout New England. Seabrook Station is a significant generating unit within NEPOOL, and its output is dispatched by NEPOOL on behalf of the joint owners to thousands of businesses and millions of individual citizens throughout New England, including those located in the plaintiff states. The Federal Energy Regulatory Commission ("FERC") regulates the wholesale sale of electricity between some of the joint owners and their retail subsidiaries, under 16 U.S.C. § 824. In addition, state regulatory authorities regulate retail sales of electricity by some of the joint owners. Mass. Gen. Laws c. 164, §§ 94 and 94G; Conn. Gen. Stat. §§ 16-19, 16-19a.

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[2] *(continued)*
ate interests. In turn, each joint owner is entitled to a share of the generated electric power equal to its ownership share. Public Service Company of New Hampshire ("PSNH"), an electric utility located in, and making retail sales of electricity to consumers located in, New Hampshire, is the single largest owner of Seabrook Station, with a 35.6 percent interest. Other New Hampshire retail utilities own a total of 2.17 percent of Seabrook Station. The United Illuminating Company and the Connecticut Light and Power Company, which are utilities located in, and making retail sales of electricity to consumers located in, Connecticut, own 17.5 percent and 4.06 percent, respectively, of Seabrook Station. Utilities located within and/or selling electricity at retail to consumers located within Massachusetts own a total of 28.06 percent of Seabrook Station. Specifically, Massachusetts Municipal Wholesale Electric Cooperative ("MMWEC") owns 11.6 percent, New England Power Company owns 10 percent, Canal Electric Company owns 3.5 percent, Montaup Electric Company owns 2.9 percent, Taunton Municipal Lighting Plant owns 0.1 percent, and Hudson Light & Power owns 0.07 percent of Seabrook Station. EUA Power owns 12.13% of Seabrook. Although a New Hampshire corporation, it is strictly a wholesale generation company with no retail customers in New Hampshire. Any profits accrue to its parent company, EUA, which includes both EUA Power and Montaup. Utilities located in the State of Vermont own the remaining 0.41% share.

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Although at first glance the application of the Seabrook Tax to all of the joint owners may appear even-handed, RSA 83-D:5, an examination of the entire legislative package creating the tax makes it clear the economic burden of the tax will ultimately fall, by intent as well as by effect, almost entirely on the non-New Hampshire consumers of electricity purchased from joint owners of Seabrook. This is because, as part of the same legislative package that created the Seabrook Tax, the New Hampshire legislature repealed the Franchise Tax formerly paid by the New Hampshire power companies, RSA 83-D:12 VI (3),[3] and provided a credit permitting New Hampshire utilities ostensibly liable for the Seabrook Tax to credit

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[2] *(continued)*
The joint owners seek to recoup the costs of constructing, operating and owning the Seabrook Station through approved electrical rates that they charge their customers.

In Rhode Island, the Blackstone Valley Electric, Newport Electric, and Pascoag Electric Companies generate no electricity themselves, but all purchase wholesale power from Montaup, which holds an ownership interest in the Seabrook plant.

[3] Prior to the enactment of the Seabrook Tax, New Hampshire utilities making retail sales of electricity within New Hampshire had paid a one percent tax upon their gross receipts from the sale of electricity in that state. RSA 83-C:1. The elimination of this obligation only affects New Hampshire utilities and their ratepayers. The other joint owners of Seabrook Station and their non-New Hampshire ratepayers receive no similar benefit. Prior to enactment of the Seabrook Tax, New Hampshire tax law provided as follows. An enterprise engaged in New Hampshire in the "manufacture, generation, distribution, transmission or sale of gas or electric energy," was defined as a "public utility". RSA 83-C:1, II. A public utility paid a franchise tax of 1% of its gross receipts. *Id.*, § 83-C:2. Gross receipts were defined as all receipts received or accrued by a public utility from the sale of gas or electricity excluding: (1) sales to another public utility subject to the New Hampshire public utility franchise tax; (2) receipts from the sale of gas or electricity for use outside of New Hampshire. *Id.*, § 83-C:1, IV. A business enterprise which paid a franchise tax as a "public utility" received a credit against its business profits tax in the amount of the utility franchise tax paid. *Id.*, § 77-A:5, I. Thus, under previous New Hampshire law, a generator or provider of electricity in New Hampshire paid a franchise tax of 1% on its sales to New Hampshire retail customers.

that liability, dollar for dollar, against the New Hampshire Business Profits Tax. RSA 83-D:12 VI (2).[4]

The net effect of these provisions is to ultimately subject out-of-state consumers to the burden of the Seabrook Tax, while effectively exempting in-state consumers from its burden. Because the tax is considered a cost of doing business for the utilities, it has been or will be passed on and paid through increased rates by their customers: that is, by the States of Connecticut, Massachusetts, and Rhode Island as consumers of electricity; by the states' political subdivisions and instrumentalities such as cities, towns, and school districts as consumers of electricity; and by all the individual consumers of electricity who are customers of these utilities – in other words, virtually the entire populations of these three New England states.

The legislation enacting the Seabrook Tax included a statement that the tax is to compensate the State of New Hampshire for the environmental impact and "unique public safety requirements and burdens" created by Seabrook Station. RSA 83-D:1. The Seabrook Tax is not designed to accomplish this purpose, however, because the public safety and environmental burdens caused by Seabrook Station have been, and continue to be, paid by all the joint owners of the Station pursuant to pre-existing and distinct federal and New Hamp-

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[4] The allowance of a credit for payment of the Seabrook Tax to be applied against the New Hampshire Business Profits Tax provides a meaningful benefit only to the New Hampshire utilities making retail sales of electricity to New Hampshire consumers because they are the only joint owners which will have any significant portion of their income apportioned to New Hampshire and subject to the Business Profits Tax. Although all joint owners are presumably subject to the New Hampshire tax by virtue of owning property there, i.e., the Seabrook plant, given the operation of the apportionment formula contained in RSA 77-A:3, I, it is clear that the only joint owner which would have significant income subject to the New Hampshire tax against which the credit could be applied is Public Service of New Hampshire.

shire laws and regulations.[5] The real purpose of the Seabrook Tax, as is apparent both from an examination of the legislation as a whole and from the legislative history,[6] is to generate revenue for the State of New Hampshire derived almost entirely from non-New Hampshire consumers of electricity.

For 1991, the first installment of the estimated tax was due and payable on September 15, 1991. This payment has been made. The plaintiff States and their consumer citizens, upon pass-through of this payment in rates, have been or will be substantially harmed by the Seabrook Tax and will suffer economic burdens and hardships because of it.

[5] The joint owners must pay a nuclear decommissioning financing charge to the state. RSA 162-F:14 *et seq.* They must also pay the cost of preparing, maintaining, and operating the state's emergency nuclear response program. RSA 107-B:1 *et seq.* In addition, they must pay fees to the federal government to fund the cost of the government's obligation to remove spent nuclear fuel from Seabrook. 42 U.S.C. §§ 10101 *et seq.* Furthermore, as a condition to their operating license from the Federal Nuclear Regulatory Commission, the joint owners must maintain hundreds of millions of dollars in financial protection to cover public liability claims. 42 U.S.C. § 2210.

[6] The New Hampshire Floor debate (May 29, 1991), House Floor debate (April 2 and 9, 1991) and a legislative hearing on the legislation (May 2, 1991) are replete with well articulated statements revealing the discriminatory nature and intent of the tax:

> If you do the math to work this out, you'll see that over 14 million dollars is paid by out-of-state interests; and you can conclude that they are indeed are [sic] financing this increase in the utility taxes that we're going to pay. Over the seven-year term of the rate agreement, I am assured by those who know that this will have no increase or negligible increase in [New Hampshire] rates, that you will not be able to see this in the negotiated five and a half per cent rate increase which this House has approved . . . I would say that this is a tax in the *New Hampshire tradition of finding some way for the other fellow to pay.*

Remarks of Representative Robert Hayes, Chairman of the Legislative Subcommittee which drafted the Seabrook Tax. New Hampshire House of Representatives Floor Debate Re: House Bill 64, April 2, 1991, pp. 25-26. (Emphasis added).

This view was also held by the New Hampshire Senate as exemplified by the statement of Senator Russman:

> It [Seabrook Tax] generates an incredible amount of revenue, given what it is, at *essentially no cost to the State of New Hampshire.*

New Hampshire Senate Floor Debate Re: House Bill 64, May 29, 1991, page 3. (Emphasis added).

SUMMARY OF ARGUMENT

I. THIS COURT HAS ORIGINAL AND EXCLUSIVE JURISDICTION OVER THIS ACTION, AND THIS CASE IS APPROPRIATE FOR THE EXERCISE OF THAT JURISDICTION.

The Supreme Court has original and exclusive jurisdiction over this action under Art. III, § 2, cl. 2 of the Constitution and 28 U.S.C. § 1251(a). The compiaint alleges a dispute between the States of Connecticut, Massachusetts, and Rhode Island on the one hand, and the State of New Hampshire on the other hand, over a taxing scheme enacted by New Hampshire on the Seabrook Station. The complaint raises important issues of federal constitutional law and alleges substantial injury to the plaintiffs.

The plaintiff States have brought this action in both their proprietary and *parens patriae* capacities. In their proprietary capacities, the plaintiff States will suffer serious injury as substantial consumers of electricity purchased from utilities which are subject to the Seabrook Tax upon inclusion of the tax cost in rates. The plaintiff States and their political subdivisions have been or will be required to pay increased rates for their electricity as a direct result of the Seabrook Tax.

In their *parens patriae* capacities, the plaintiff States bring this action to redress serious harm caused by the Seabrook Tax to their citizens who purchase electricity from utilities which are subject to the tax. Virtually the entire populations of the States of Connecticut and Rhode Island, and a large portion of the population of Massachusetts, have been or will be injured by the Seabrook Tax. It is estimated that

over the life of the Seabrook Station, the citizens of the plaintiff States will pay approximately half a billion dollars in increased electricity rates as a result of the Seabrook Tax.

This is an appropriate case for the Supreme Court to exercise its original and exclusive jurisdiction because of the serious nature of the claim involved. This case raises issues of national significance concerning interstate commerce and the supremacy of federal law, implicating federalism concerns which are at the core of this Court's original and exclusive jurisdiction. The Seabrook Tax by design discriminates against out-of-state producers and consumers of electricity in direct conflict with both the Commerce Clause and Section 212(a) of the Tax Reform Act of 1976, 90 Stat. 1914, codified at 15 U.S.C. § 391, as well as with decisions of this Court. *See Maryland v. Louisiana*, 451 U.S. 725 (1981); *Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979).

Further, the parties actually injured by the tax – that is, the consumers of electricity in the plaintiff States who must pay the tax through higher rates – have no other adequate forum in which to challenge the tax. The utilities which are assessed the tax can merely pass it on through their rates to their customers, and have not mounted a constitutional challenge to the tax. They have already made the first estimated tax payment to New Hampshire on September 15, 1991. There is no pending state court or administrative proceeding raising the issue of the tax's constitutionality, leaving the injured consumers of electricity with the inevitable obligation to pay the tax through higher rates but with no practical opportunity to challenge its legality other than through the present complaint.

This case is factually and legally similar to *Maryland v. Louisiana*, 451 U.S. 725 (1981), in which the Supreme Court exercised its original and exclusive jurisdiction in a challenge to Louisiana's First Use Tax on natural gas brought by nine states in their proprietary capacities as consumers of natural gas and in their *parens patriae* capacities representing their

citizens as consumers of natural gas. There is at most a limited amount of fact finding necessary to a determination of the legal issues raised in this case, and such facts may be established through documentary evidence or by stipulation, avoiding the need for testimony and assessments of credibility.

II. THE SEABROOK TAX RAISES IMPORTANT AND SUBSTANTIAL FEDERAL QUESTIONS AND IS IN CONFLICT WITH FEDERAL LAW AND APPLICABLE DECISIONS OF THIS COURT.

The Seabrook Tax violates several provisions of the United States Constitution:

A. The Seabrook Tax Violates 15 U.S.C. § 391 And Therefore Is Invalid Under The Supremacy Clause.

Section 212(a) of the Tax Reform Act of 1976, 90 Stat. 1914, codified at 15 U.S.C. § 391, provides in relevant part:

> No State . . . may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out of State manufacturers, producers, wholesalers, retailers, or consumers of that electricity.

There can be little question that the Seabrook Tax is a tax "on or with respect to the generation or transmission of electricity," and that through New Hampshire's scheme of tax credits and exemptions for in-state utility owners and consumers it discriminates against out-of-state producers, retailers, and consumers of that electricity, in direct violation of this federal law. A similar New Mexico tax scheme was found by this Court to be contrary to this same federal law and unconstitutional under the Supremacy Clause in *Arizona Public Serv. Co. v. Snead, supra.* The same result is warranted here.

B. The Seabrook Tax Violates The Commerce Clause.

The Seabrook Tax violates the Commerce Clause because it intentionally and by effect discriminates against interstate commerce, is not fairly apportioned among the joint owners, and is not fairly related to services provided by the taxing state. *See Washington Revenue Dept. v. Washington Stevedoring Assn.*, 435 U.S. 734, 750 (1978); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

C. The Seabrook Tax Violates The Equal Protection Clause.

The undeniable discrimination between New Hampshire consumers of electricity and non-New Hampshire consumers who purchase electricity either directly or indirectly from the joint owners of Seabrook is arbitrary and capricious and violates the Equal Protection Clause. The classification created by this taxing scheme – that the tax burden almost exclusively will fall on non-New Hampshire consumers of electricity – is not rationally related to any legitimate state purpose and therefore violates the Equal Protection Clause.

D. The Seabrook Tax Violates The Privileges And Immunities Clause.

The Seabrook Tax falls almost exclusively upon non-New Hampshire ratepayers. These non-residents are entitled to the same treatment as New Hampshire residents. The calculated deprivation of such equality by the New Hampshire legislature is contrary to the Privileges and Immunities Clause of the Constitution.

ARGUMENT

I. THIS COURT HAS ORIGINAL AND EXCLUSIVE JURISDICTION OVER THIS ACTION, AND THIS CASE IS AN APPROPRIATE ONE IN WHICH TO EXERCISE THAT JURISDICTION.

A. This Court Has Original And Exclusive Jurisdiction Over This Action.

This complaint is based on a dispute between the sovereign states of Connecticut and Rhode Island and the sovereign Commonwealth of Massachusetts, on the one hand, and the sovereign state of New Hampshire on the other. As such, the complaint falls within Art. III, § 2, cl. 2 of the Constitution, which provides the Supreme Court with original jurisdiction over cases in which a "State shall be a Party." It also falls within the parameters of 28 U.S.C. § 1251(a), which gives the Supreme Court "original and exclusive jurisdiction of all controversies between two or more states."

This Court's previous interpretations of its jurisdiction under these two provisions leave no doubt that the present dispute between the states constitutes a proper "controversy" sufficient to invoke this Court's jurisdiction. As this Court has held:

> In order to constitute a proper "controversy" under our original jurisdiction, "it must appear that the complaining State has suffered a wrong through the action of the other State, furnishing ground for judicial redress, or is asserting a right against the other State which is susceptible of judicial enforcement according to the accepted principles of the common law or equity systems of jurisprudence." *Massachusetts v. Missouri*, 308 U.S. 1, 15, 60 S.Ct. 39, 42, 84 L.Ed. 3 (1939). See *New York v. Illinois*, 274 U.S. 488, 490, 47 S.Ct. 661, 71 L.Ed. 1164 (1927); *Texas v. Florida*, 306 U.S. 398, 405, 59 S.Ct. 563, 567, 83 L.Ed. 817 (1939).

Maryland v. Louisiana, *supra*, 451 U.S. at 735-736.

The plaintiff States satisfy these jurisdictional requirements both in their proprietary capacities as substantial consumers of electricity, and in their *parens patriae* capacities on behalf of their citizens.

1. Jurisdiction Is Established By The Injury To The Plaintiff States In Their Proprietary Capacities.

The plaintiff States are major consumers of electricity purchased from utilities that are joint owners of the Seabrook Station. In fiscal year 1989-1990, the State of Connecticut as proprietor of numerous state buildings used nearly a half billion kilowatt-hours of electricity provided from the two Connecticut joint owners of Seabrook, resulting in charges of over 36 million dollars. These joint owners of the Seabrook Station are subject to the Seabrook Tax. Connecticut continues to purchase and consume substantial amounts of electricity from utilities subject to the Seabrook Tax, and will continue to do so.

In the fiscal year ending June 30, 1991, the Commonwealth of Massachusetts as proprietor of numerous state buildings consumed substantial amounts of electricity provided from joint owners of Seabrook, resulting in charges of over 16.5 million dollars. These joint owners of the Seabrook Station are subject to the Seabrook Tax. The Commonwealth of Massachusetts continues to purchase and consume substantial amounts of electricity from utilities subject to the Seabrook Tax, and will continue to do so.

In fiscal year 1990-1991, the State of Rhode Island as proprietor of numerous state buildings used over 100 million kilowatt-hours of electricity provided from joint owners of Seabrook, resulting in charges of over 12 million dollars. These joint owners of the Seabrook Station are subject to the Seabrook Tax. Rhode Island continues to purchase and consume substantial amounts of electricity from utilities subject, directly or indirectly, to the Seabrook Tax, and will continue to do so.

The Seabrook Tax on the utilities constitutes a cost of doing business which is recoverable from the ultimate consumers of electricity, including the plaintiff States, in the form of increased rates.[7] The plaintiff States, as major purchasers of electricity whose costs will increase as a result of the New Hampshire Seabrook Tax, are thus "directly affected in a 'substantial and real' way so as to justify their exercise of this Court's original jurisdiction." *Maryland v. Louisiana, supra*, 451 U.S. at 737.

2. Jurisdiction Is Also Established By The Substantial Injury To The General Population Of The Plaintiff States Which Are Represented By The Plaintiffs In Their *Parens Patriae* Capacity.

Although a state may not invoke this Court's original jurisdiction as a nominal party on behalf of individual citizens, it may "act as the representative of its citizens in original actions where the injury alleged affects the general popula-

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[7] In a recent rate setting decision concerning the Connecticut Light and Power Company, one of the Connecticut joint owners of Seabrook Station, the Connecticut Department of Public Utility Control ("DPUC") noted that, under its rate-setting policies, the Seabrook Tax is unquestionably a cost which would be included in customer rates. *See*, Decision, *In Re Application of Connecticut Light and Power Company*, Docket #90-12-03, Aug. 1, 1991, p. 18, footnote, reprinted in excerpted form in the Addendum to this brief.

In Rhode Island, the Settlement Agreement with Montaup Electric Company which was filed with FERC on September 13, 1991 includes a pass-through of the Seabrook Tax. The Blackstone Valley Electric, Newport Electric, and Pascoag Electric Companies all purchase wholesale power from Montaup, which holds an ownership interest in the Seabrook plant. The annual impact on Rhode Island utilities from the pass-through of this tax by Montaup alone (Rhode Island utilities are also affected by New England Power's share of the tax) is estimated to be nearly a quarter of a million dollars.

In Massachusetts, customers of MMWEC have already had their electric rates increased to reflect that utility's assessment of the Seabrook Tax.

tion of a State in a substantial way." *Maryland v. Louisiana*, *supra*, 451 U.S. at 737. This is such a case.

The present case presents a controversy in which the vast majority of the populations of the plaintiff States have been or will be injured by the action of New Hampshire. Most of the citizens of the plaintiff States, and in fact of the entire New England region, are consumers of electricity purchased from utilities that are subject to the Seabrook Tax, and they all are subject to the payment of higher utility rates as a result of the tax. It is estimated that for each year of the Seabrook Tax, the consumers in the three plaintiff States will have to pay approximately an additional $14 million in increased rates caused by the tax, with an estimated total of nearly half a billion dollars additional over the life of the Seabrook Station.[8] This represents a significant injury to most of the citizens of these states.

This case is indistinguishable from *Maryland v. Louisiana*, *supra*, in which natural gas consumers in a number of states were injured by a Louisiana First Use tax on natural gas imported into Louisiana, and *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), in which natural gas consumers

[8] These figures are based on estimates of valuation of Seabrook Station as contained in the Seabrook Tax. For 1991, the Nuclear Station Property Tax requires that Seabrook Station be valued at no more than $3,500,000,000 and that estimated tax payments be based on a valuation of $3,500,000,000. If Seabrook Station is assessed at this value, the joint owners' aggregate liability under the Seabrook Tax would be approximately $22,400,000 per year. Of this amount, $14 million will be borne by consumers in Massachusetts, Connecticut and Rhode Island in the form of higher rates. The legislative history reveals that the intent of the New Hampshire legislature was to raise only the additional $14 million to be paid by out-of-state consumers, with the remaining $8 million ostensibly paid by New Hampshire citizens to be effectively negated through the simultaneous repeal of the Franchise Tax and the allowance of credits to the Business Profits Tax. See comments of Rep. Robert Hayes, Chairman of the legislative subcommittee which drafted the Seabrook Tax, New Hampshire House of Representatives Floor Debate Re: House Bill 64, April 2, 1991, p. 25, contained in Addendum to this brief.

in Ohio and Pennsylvania were injured by a West Virginia law restricting the interstate shipment of gas. In both those cases, this Court found that the respective plaintiff States could properly invoke this Court's original and exclusive jurisdiction as *parens patriae* representatives of their citizens' interests. By contrast, in those cases in which this Court has declined to exercise its original jurisdiction, only a small number of citizens was directly injured by the challenged action. *See Massachusetts v. Missouri*, 308 U.S. 1, 17 (1939); *Oklahoma, ex rel. Johnson v. Cook*, 304 U.S. 387 (1938).

The plaintiff States have properly invoked the Supreme Court's original and exclusive jurisdiction because they will suffer substantial and serious injury from the New Hampshire tax in their proprietary capacities as substantial consumers of electricity, and because millions of their citizens will suffer similar substantial injury in their consumption of a product essential to their health, safety, and welfare.

B. This Is An Appropriate Case In Which To Exercise The Supreme Court's Original And Exclusive Jurisdiction.

This Court has interpreted its grant of exclusive jurisdiction under 28 U.S.C. § 1251(a) as giving the Court "substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in th[e] Court for particular disputes within [its] constitutional original jurisdiction ..." *Texas v. New Mexico*, 462 U.S. 554, 570 (1983) (citations omitted).[9] The Court's "case-by-case" judgments about its jurisdiction rest on "prudential" and "equitable"

[9] *But see California v. West Virginia*, 454 U.S. 1027 (1981) (Stevens, J., dissenting from order denying motion for leave to file complaint); *Illinois v. City of Milwaukee*, 406 U.S. 91, 102 n.2 (1972), citing H.R. Rep. No. 308, 80th Cong., 1st Sess., A 104 (1947) ("Congress may provide for or deny exclusiveness."); *New Orleans Public Service, Inc. v. Council*, 491 U.S. 350, 358-359 (1989) (federal courts lack authority to abstain from the exercise of jurisdiction conferred).

standards. *California v. Texas*, 457 U.S. 164, 168 (1982).

In determining whether a case is appropriate for the exercise of this Court's original and exclusive jurisdiction, this Court has looked both at the nature and seriousness of the claim itself, and at the availability of another forum in which to resolve the claim. *See Arizona v. New Mexico*, 425 U.S. 794, 796-797 (1976); *Massachusetts v. Missouri*, *supra*, 308 U.S. at 18. The Court is especially concerned with claims that "implicate[] the unique concerns of federalism forming the basis of [its] original jurisdiction." *Maryland v. Louisiana*, 451 U.S. at 725. Finally, the Court weighs the interests of the United States in the subject matter of the proposed original case. In accepting jurisdiction of *Maryland v. Louisiana*, for example, the Court cited the interests of the United States "under the regulatory mechanism that supervises the production and development of natural gas resources." *Id.* at 744-745. In this case, each of these factors supports the exercise of jurisdiction.

At the heart of the dispute in this case are basic federal constitutional issues with important national implications. New Hampshire's Seabrook Tax intentionally burdens interstate commerce while protecting local interests. In doing so, it undermines "[t]he very purpose of the Commerce Clause [which] was to create an area of free trade among the several States"; *McLead v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944); and to prevent "'a multiplication of preferential trade areas destructive' of the free trade which the Clause protects. *Dean Milk Co. v. Madison*, 340 U.S. 349, 356, 71 S.Ct. 295, 299, 95 L.Ed. 329 (1951)." *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 329 (1977).

Further, there are significant federal interests at stake in this case. The Seabrook Tax directly conflicts with federal law prohibiting taxation on the generation or transmission of electricity in a way that discriminates against out-of-state producers and consumers. 15 U.S.C. § 391. As this Court has recognized, the importance of such an issue extends far beyond this one tax and this one case, because "what one state may

do others may [do] . . . and what may be done with one natural product may be done with others . . ." *Pennsylvania v. West Virginia*, *supra*, 262 U.S. at 596. The New Hampshire tax represents precisely the type of interstate feudalism that the Commerce Clause and 15 U.S.C. § 391 were designed to prevent. Plaintiffs' claims against the tax therefore implicate "serious and important concerns of federalism" within the "purposes and reach of [the Court's] original jurisdiction." *Maryland v. Louisiana*, 451 U.S. at 744; *see Pennsylvania v. West Virginia*, *supra*, 262 U.S. at 591-592.[10]

Important interests of the federal executive branch are also at stake. The national energy policy as contained in chapter 23 of Title 42 of the United States Code, 42 U.S.C. §§ 2011, 2012, 2013, calls for the development and peaceful use of nuclear energy. This policy is of critical importance in New England, which has depended heavily on imports of foreign oil. It was in furtherance of this national policy that the utility owners in the present case banded together in 1973 to construct a nuclear power generating plant, Seabrook Station, to provide electricity to the New England region. *See* footnote 2, *supra*,. New Hampshire's Seabrook Tax, by placing a discriminatory tax burden on the non-New Hampshire customers of Seabrook Station, interferes with this national policy of promoting development of nuclear energy, and indeed threatens its continuation in the New England region.

In addition, the Federal Power Act, 16 U.S.C. § 824 grants FERC regulatory authority over "interstate wholesale power rates." *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 956 (1986). The Federal Power Act gives the Commission the power to decide whether the costs which underlie wholesale rates are "reasonable." *Id.* at 956-957. In this case, the Commission has already entered the controversy, since at least

[10] Nor is this a case in which the alleged injury was "self-inflicted"; *see Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976); or limited to issues of local law. *See Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 504 (1971).

one of the utilities which paid the estimated New Hampshire tax due September 15, 1991, has already applied to FERC for permission to pass on the cost of the tax to its Rhode Island customers. *See* footnote 7, *supra*, p. 17.

Further, there is no adequate alternate forum in which the parties actually injured by the Seabrook Tax can effectively challenge its legality. In exercising its original jurisdiction, the Court considers "the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where the appropriate relief may be had." *California v. Texas*, *supra*, 457 U.S. at 168, quoting *Illinois v. City of Milwaukee*, *supra*, 406 U.S. at 93-94.

In *Maryland v. Louisiana*, the Court accepted jurisdiction on the grounds that (1) none of the plaintiff States in *Maryland* had interests represented in a pending state court suit; (2) the Louisiana First Use Tax had already affected the retail costs of natural gas; and (3) the Louisiana tax affected numerous citizens in a number of states. *Id.* at 743-744; *see also Kentucky v. Indiana*, 281 U.S. 163, 177 (1930) (original jurisdiction exercised despite related, pending state court case). All of these factors support the exercise of jurisdiction here.

In the present case, the tax has been imposed virtually entirely on utility companies which sell electricity at retail to out-of-state consumers, with the ultimate resulting burden falling on the consumers of the electricity generated – that is, on the plaintiff States and their citizens. Since these actual victims will pay the tax indirectly through their rates rather than directly to the New Hampshire taxing authorities, it is highly unlikely that they will have any adequate forum in which to challenge the tax or seek a refund. Only the exercise of the Supreme Court's original and exclusive jurisdiction in this matter will provide an appropriate and effective forum

for the parties with a true stake in the outcome.[11]

Ironically, although the utilities as joint owners may have a means of contesting the tax, they have not suffered a true injury since the tax they pay can simply be passed on to their customers. Significantly, no constitutional challenge to the tax has been brought in any other forum by the utilities, and the tax has gone uncontested. For this reason, the present case is unlike *Arizona v. New Mexico*, *supra*, in which this Court declined to exercise jurisdiction, in part because at the time this Court's original jurisdiction was invoked, Arizona's interests were being represented in a state court action by an electric company which was actually a political subdivision of the state. *See Maryland v. Louisiana*, 451 U.S. at 743. In fact, the present case is even more compelling than *Maryland v. Louisiana*, in which this Court exercised its jurisdiction despite the pendency of state court actions challenging the tax in question. *Id.* at 740-743. Here, the ultimate consumers have or will become obligated to pay the tax through their increased rates without any legal recourse except the present action.

[11] The plaintiffs have no other plain, speedy, or adequate remedy in any forum other than the Supreme Court. The federal courts appear foreclosed by virtue of the Tax Injunction Act, 28 U.S.C. § 1341, *see Franchise Tax Board of California v. Alcan Aluminum*, 110 S.Ct. 661, 666 (1990), and by the Eleventh Amendment as it applies to the citizens of the plaintiff States. Neither of these grounds bars an original jurisdiction action brought in the Supreme Court. *Maryland v. Louisiana*, 451 U.S. at 745 n.21.

Similarly, it is at best speculative that the plaintiffs would be able to challenge the tax in New Hampshire state courts because the plaintiffs neither pay the Seabrook Tax directly, nor are they New Hampshire ratepayers. The possibility of such a state court action is thus speculative at best, and should not preclude the exercise of this Court's jurisdiction. At any rate, the purpose of providing for original jurisdiction in the Supreme Court for actions between states, or between a state and citizens of another state, "was to enable such controversies to be determined by a national tribunal, and thereby to avoid the partiality, or suspicions of partiality, which might exist if the plaintiff State[s] were compelled to resort to the courts of the state of which the defendants were citizens." *Massachusetts v. Mellon*, 262 U.S. 447, 481 (1923).

Nor is this a case in which extensive fact finding will be necessary. *See Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 498 (1971). Such facts as may be necessary primarily concern such matters as the relative ownership interests in Seabrook Station of the various utilities; the consumption of electricity by the Plaintiffs; the amount of tax revenue generated by the tax; and the increase in electricity rates which will result from the tax. These facts may be established by documentary evidence or even by stipulation, avoiding the need for lengthy testimony and assessments of credibility.

This case is factually and legally similar to *Maryland v. Louisiana*, in which this Court exercised its original and exclusive jurisdiction in a challenge to Louisiana's First Use Tax on natural gas brought by nine states in both their proprietary capacities as substantial consumers of natural gas and in their *parens patriae* capacities representing their citizens who were consumers of natural gas.

The present case is thus an appropriate one for the exercise of this Court's original and exclusive jurisdiction. It involves serious questions of federal constitutional law that will affect millions of citizens in the three plaintiff States, and there is no adequate alternate forum available for the injured parties to obtain relief. Consequently, the exercise of jurisdiction would serve the purposes underlying Article III, § 2, cl. 2, and is necessary for the protection of the plaintiffs' interests.

II. THE SEABROOK TAX RAISES IMPORTANT AND SUBSTANTIAL FEDERAL QUESTIONS AND IS IN CONFLICT WITH FEDERAL LAW AND APPLICABLE DECISIONS OF THIS COURT

The New Hampshire legislature's thinly disguised attempt to shift New Hampshire's tax burden to citizens of other states offends several provisions of the United States Constitution.

A. The Seabrook Tax Violates Section 2121(a) Of The Tax Reform Act Of 1976, 15 U.S.C. § 391, And Therefore Is Invalid Under The Supremacy Clause.

By repealing the Franchise Tax and establishing a credit against New Hampshire's Business Profits Tax for taxes paid under the Seabrook Tax, the Seabrook Tax violates section 2121(a) of the Tax Reform Act of 1976, codified at 15 U.S.C. § 391.

Section 391 prohibits a state from enacting a tax on the generation or transmission of electricity that discriminates against out-of-state users of that electricity. The full text of the statute provides:

> No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

15 U.S.C. § 391.

The discriminatory effect of the Seabrook Tax results from both the repeal of the Franchise Tax and the tax credit provision of the statute. Since the repeal of the Franchise Tax only benefits utilities making retail sales of electricity to New Hampshire consumers, and likewise these same New Hampshire utilities are the only significant beneficiaries of the simultaneously enacted credit to the Business Profits Tax, the entire Seabrook Tax package has the effect of discriminating against out-of-state consumers of electricity and fulfills the clear intent of the New Hampshire legislature that the full burden

of this tax fall on out-of-staters. Under the tax credit portion of the package, a joint owner subject to the Business Profits Tax may reduce liability for that tax by means of a credit for taxes paid under the Seabrook Tax. Since sales of electricity outside New Hampshire do not subject a joint owner to tax liability under the New Hampshire Business Profits Tax, those sales provide no tax basis against which to offset the nuclear station property tax. As a consequence, the credit provision discriminates against out-of-state users of electrical power generated in New Hampshire, whose rates will not reflect the benefit of any tax credit.

1. The Statute Imposes A Tax "On Or With Respect To The Generation Or Transmission Of Electricity."

Section 391 prohibits a discriminatory tax "on or with respect to the generation or transmission of electricity." Notwithstanding that the Seabrook Tax is in the form of a tax on "ownership" in "property," the tax plainly falls within the prohibition of section 391.

Section 83-D:3 of the New Hampshire statute imposes a tax at the rate of 0.64% of the value of nuclear station property on each person with an "ownership interest" in "nuclear station property," in the proportion that such person's ownership interest bears to the entire ownership of the property. N.H. Rev. Stat. Ann. c. 83-D:3 and c. 83-D:5. The statute defines "nuclear station property" as "land, buildings, structures, tunnels, machinery, dynamos, apparatus, poles, wires, nuclear fuel and fixtures of all kinds and descriptions used in generating, producing, supplying and distributing electric power or light from the fission of atoms, exclusive of transmission lines." N.H. Rev. Stat. Ann. c. 83-D:2.

Since the property taxed by the statute by definition is used solely for the purpose of "generating, producing, supplying and distributing" electric power, the tax in effect is a tax "on or with respect to the generation or transmission of

electricity," notwithstanding that the tax takes the form of a tax on property.

This Court did not have occasion to consider the scope of the language "on or with respect to the generation or transmission of electricity," in the leading case interpreting § 391, *Arizona Public Service Co. v. Snead, supra.*[12]

However, in cases involving the interpretation of tax statutes in other contexts, the Court has emphasized that the substance of a transaction, not its form, is determinative of the tax consequences of the transaction. *See, e.g., Commissioner of Internal Revenue v. Court Holding Co.*, 324 U.S. 331 (1945).

Moreover, since § 391 by its terms prohibits any tax which even *indirectly* results in a greater tax burden on electricity generated and transmitted in interstate commerce than in intrastate commerce, the fact that the Seabrook Tax takes the form of a property tax does not remove it from the strictures of § 391.

Therefore, since the Seabrook tax in substance and effect *is* a tax "on or with respect to the generation or transmission of electricity," it is subject to the prohibition in 15 U.S.C. § 391 of such taxes that discriminate against out-of-state users of the electricity.

2. The Statute Discriminates Against Out-of-State Consumers Of Electricity Generated In New Hampshire.

Through its scheme of tax credits and exemptions for in-state utility owners of the Seabrook Station, which insulates in-state consumers from the burden of the tax while imposing

[12] Since the state tax statute at issue in *Snead* explicitly imposed a tax "on any person generating electricity," 441 U.S. at 143 n.4, the tax was "concededly a tax on the generation of electricity." 441 U.S. at 149.

it fully on out-of-state consumers, the Seabrook Tax "results . . . in a greater tax burden on electricity which is generated and transmitted in interstate commerce than transmitted in intrastate commerce," in violation of section 391. The discriminatory impact of the tax results from the fact that sales of electricity within New Hampshire by a joint owner of Seabrook subject the owner to the New Hampshire Business Profits Tax (and thereby allow the owner to offset taxes paid under the Seabrook Tax by a credit against the Business Profits Tax), whereas sales of electricity outside New Hampshire do not subject the owner to liability for the Business Profits Tax (and, accordingly, do not allow the owner to offset taxes paid under the Seabrook Tax by a credit against the Business Profits Tax).

As discussed above (*see*, "Statement" *supra* pages 6-8), Seabrook is jointly owned by various public utility companies, each of which owns a varying share of the nuclear power station. Since sales of electricity within New Hampshire constitute "business activity" for purposes of the business profits tax, each of the joint owners that makes sales of electricity within New Hampshire is subject to the Business Profits Tax and, accordingly, may use that tax liability as a basis against which to offset (by means of the tax credit) their liability for the Seabrook Tax.

Most of the joint owners (such as MMWEC, Canal, Montaup, United Illuminating, and Connecticut Light and Power)[13] that make retail sales of electricity only outside of New Hampshire are subject to little or no Business Profits Tax, and therefore receive little or no benefit from the credit provision. The discriminatory effect of the tax is most obvious as to out-of-state sales by those joint owners.

In addition, the tax discriminates against out-of-state sales made by even those joint owners who, although they make only out-of-state sales, nevertheless may incur a nominal tax liability under the Business Profits Tax (and, accordingly, may receive a nominal credit), as a consequence of their corporate presence in New Hampshire as a joint owner of Seabrook or their corporate relation to a parent corporation that is subject to the business profits tax for sales of electricity within New Hampshire. Because of the formula used to apportion the net income for the New Hampshire Business Profits Tax, the credit for these companies will be at most insignificant.

[13] See footnote 2, *supra*.

The New Hampshire tax is virtually identical to the tax struck down by this Court in *Arizona Public Service Co. v. Snead, supra*. *Snead* concerned New Mexico's Electrical Energy Tax Act, which imposed a 2% energy tax "on any person generating electricity" within the state. 441 U.S. at 143 n.4. The tax applied to electricity generated in New Mexico and sold either within or outside the state. *Id.* The Act further provided that the electrical energy tax could be fully credited against a company's tax liability under the state's gross receipts tax (a 4% tax on retail sales of electricity within New Mexico). Plaintiffs in *Snead*, several public utility companies that generated electricity within New Mexico and sold the bulk of the electricity to out-of-state consumers, challenged the tax under 15 U.S.C. § 391, as well as under the Commerce Clause, Due Process Clause, and Import-Export Clause of the Constitution.[14]

The Court held that the electrical energy tax violated 15 U.S.C. § 391 because the effect of the tax was to discriminate against sales of electricity made outside New Mexico. The discriminatory effect of the tax resulted from the fact that "a generating company's 2% tax is completely offset by the credit against the 4% retail sales tax when its electricity is sold within New Mexico. But to the extent that the electricity generated in New Mexico is not sold at retail in the State,

[14] Because the Court concluded that the tax was invalid under the statute and the Supremacy Clause, it did not reach the substantive constitutional claims.

there is no gross receipts tax liability against which to offset the electrical energy tax liability of the generating company." 441 U.S. at 145.

The Court found that the New Mexico tax clearly was a tax "on the generation of electricity." Furthermore,

> [t]he tax-credit provisions of the Act itself insure that locally consumed electricity is subject to *no* tax burden from the electrical energy tax, while the bulk of the electricity generated in New Mexico by the appellants is subject to a 2% tax, since it is sold outside the State . . . . Because the electrical energy tax *itself* indirectly but necessarily discriminates against electricity sold outside New Mexico, it violates the federal statute.

441 U.S. at 149-150 (emphasis in original) (footnote omitted).

The Seabrook Tax suffers from precisely the same discriminatory feature as the electrical energy tax at issue in *Snead*. Like the New Mexico tax, New Hampshire's Seabrook Tax provides a credit for payment of the Seabrook Tax that may be used to offset payment of the business profits tax. And like the credit provision in the New Mexico tax, the New Hampshire tax credit provision "*itself* indirectly but necessarily discriminates against electricity sold outside [New Hampshire]," and thus violates the federal statute.

Through § 391, Congress has set the standard for the taxation of electricity generated and transmitted in interstate commerce. This Court struck down the electrical energy tax in *Snead*, concluding that "under the Supremacy Clause, the tax is invalid by reason of this federal statute . . . ." *Snead*, 441 U.S. at 146 (footnote omitted). The New Hampshire Seabrook Tax statute, by directly conflicting with this same federal statute, is thus also invalid under the Supremacy Clause.

B. The Seabrook Tax Violates The Commerce Clause.

The purpose of the Commerce Clause, Const. art. I, § 8, cl. 3, was "to avoid the tendencies toward economic Balkanization that had plagued relations between the Colonies and later among the states under the Articles of Confederation," *Hughes v. Oklahoma*, 441 U.S. 332, 325-326 (1979), and to create a "federal free trade unit" based on the principle that "our economic unit is the Nation" and not the separate, individual States. *H.P. Hood and Sons, Inc. v. DuMond*, 336 U.S. 525, 537-538 (1949).

The "Commerce Clause not only grants Congress the authority to regulate commerce among the States, but also directly limits the power of the States to discriminate against interstate commerce." *New Energy Company of Indiana v. Limbach*, 486 U.S. 269 (1988) (citations omitted). "This 'negative aspect' of the Commerce Clause prohibits economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Id.* (citations omitted).

The generation and transmission of electricity is an activity of interstate commerce. *Federal Energy Regulatory Com'n v. Mississippi*, 456 U.S. 742, 757 (1982).[15] To be valid under the Commerce Clause, a state tax on an activity of interstate commerce must: (1) be applied to an activity with a substantial nexus with the taxing state; (2) be fairly apportioned; (3) not discriminate against interstate commerce; and (4) be fairly related to services provided by the taxing state. *Washington Revenue Dept. v. Washington Stevedoring Assn., supra*, 435 U.S. at 750; *Complete Auto Transit, Inc. v. Brady, supra*, 430 U.S. at 279. The New Hampshire Seabrook Tax fails this test.

[15] "[I]t is difficult to conceive of a more basic element of interstate commerce than electric energy, a product used in virtually every home and every commercial or manufacturing facility." *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742, 757 (1982).

Fundamental to the very purpose of the Commerce Clause is the principle that no state may "'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.' *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458, 79 S.Ct. 357, 362, 3 L.Ed.2d 421 (1959)." *Maryland v. Louisiana, supra*, 451 U.S. at 754. In determining whether a tax discriminates against interstate commerce, it "must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme." *Id.* at 756.

A review of the entire Seabrook Tax scheme reveals that, as with the Louisiana First Use Tax struck down in *Maryland v. Louisiana*, the New Hampshire tax "unquestionably discriminates against interstate commerce in favor of local interests as the necessary result of various tax credits and exclusions." *Id.* at 756. Under the specific provisions of the Seabrook Tax, a tax of .64 percent of valuation of the Seabrook Station property is assessed upon "each person with an ownership interest in nuclear station property, in the proportion that such person's ownership interest bears to the entirety of the ownership of the property." RSA 83-D:3; 83-D:5. Since utilities making no retail sales of electricity to New Hampshire consumers have a 62.23% ownership interest in Seabrook Station, they are liable for 62.23% of the assessed tax, while owners which make retail sales of electricity to New Hampshire consumers and hold a 37.77% ownership interest, should be liable for 37.77% of the assessed tax. However, because the legislation goes on to exempt these in-state utilities, and ultimately their customers, from the Franchise Tax, RSA 83-D:12 VI(3), and to provide them with a dollar-for-dollar credit against the Business Profits Tax, RSA 83-12 VI(2), these utilities, and thus their New Hampshire customers, will in reality pay at most a *de minimis* portion of the Seabrook Tax, while owners selling electricity at retail to consumers in the plaintiff States will bear the full burden of the tax. In reality, then, this tax scheme unquestionably discriminates against out-of-state consumers.

This discriminatory scheme is precisely the same situation as that which occurred in *Maryland v. Louisiana, supra*, where this Court struck down Louisiana's First Use Tax because of its blatant favoritism to local interests. If the New Hampshire "tradition" of devising schemes to tax only out-of-state residents is successful, it is probable that other states will attempt to retaliate, leading to the very Balkanization of, and rivalry between, states that the Commerce Clause was designed to prevent.

In addition, although the stated purpose of the tax is to compensate New Hampshire for the "special and unique" burdens on the state caused by a nuclear power plant, RSA 83-D:1, the costs associated with specific burdens are already being paid by all the joint owners of Seabrook Station pursuant to pre-existing and distinct federal and state statutes and regulations. See footnote 5, *supra*. Consequently, because there is no basis for an additional tax to meet that objective, the tax is unrelated to the services provided by New Hampshire.

Because the Seabrook Tax unfairly discriminates against interstate commerce, is not fairly apportioned, and is not fairly related to the services provided by New Hampshire, it violates the Commerce Clause.

C. The Seabrook Tax Violates The Equal Protection Clause Of The Fourteenth Amendment.

To be valid under the Equal Protection Clause, a taxing statute must be rationally related to a legitimate state purpose. *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 527-528 (1959). Any classification made by the tax must further that legitimate purpose and do so in a way that is not arbitrary and capricious. *Id.*

Through its system of tax credits and exemptions for in-state utility owners and consumers which are not available to utility owners selling to out-of-state consumers, the Sea-

brook Tax classifies taxpayers into two groups based solely on their relationship to New Hampshire: one group consists of in-state utility owners and consumers, who are effectively exempted from payment of the tax; the other group consists of utility owners selling at retail to out-of-state consumers, who are fully subject to the tax.

> It is settled law that a state's taxing authority does not justify imposition of more onerous taxes or other burdens on foreign corporations than those imposed on domestic corporations, unless the discrimination between foreign and domestic corporations bears a rational relation to a legitimate state purpose.

W. & S. Life Ins. Co. v. State Board of Equalization, 451 U.S. 648, 668 (1981).

The stated purpose of the Seabrook Tax is to compensate New Hampshire for burdens caused by the presence of a nuclear power plant. RSA 82-D:1. As stated earlier, the tax does not further that interest because these costs have been and are being met by all the joint owners through other pre-existing and distinct federal and state laws. For this reason, the tax itself, even if it were apportioned fairly between in-state and out-of-state owners, would fail to serve a legitimate state purpose.

Moreover, even if the stated purpose were legitimate, there can be no rational basis for distinguishing between in-state and out-of-state consumers in seeking compensation for the purported increased burden. If there are any services provided by New Hampshire to justify the tax, then all consumers, both in-state and out, benefit from them and ought to pay for them. *Arizona Public Serv. Co. v. Snead, supra*, 441 U.S. at 150-151. New Hampshire's attempt to impose the entire burden of the tax on out-of-state consumers while insulating in-state consumers is arbitrary, capricious, and "constitutes the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent." *Metropolitan Life Ins. Co. v. Ward*,

470 U.S. 869, 878 (1985).[16]

D. The Seabrook Tax Violates The Privileges And Immunities Clause.

The Privileges and Immunities Clause has long been interpreted to protect nonresidents of a state "from higher taxes or impositions than are paid by the other citizens of the state" *Austin v. New Hampshire*, 420 U.S. 656, 661 (1975), quoting *Corfield v. Coryell*, 6 F.Cas. pp. 546, 552 (No. 3,230) (CCED Pa. 1825). A fundamental purpose of this clause is that nonresidents doing business or working in a state are entitled to "substantial equality" with the citizens of the state when it comes to taxation. *Austin v. New Hampshire, supra*, 420 U.S. at 662-664, citing *Toomer v. Witsell*, 334 U.S. 385, 395-396 (1948); and *Ward v. Maryland*, 12 Wall. 418, 20 L.Ed. 449 (1871).

It is clear that the Seabrook Tax imposes a burden on nonresidents which is not shared by residents. *Austin v. New Hampshire, supra*, involved a similar New Hampshire tax scheme which imposed a tax on non-residents' New Hampshire-derived income, while exempting from the burden of the tax all income of New Hampshire residents. In striking the tax down as violative of the Privileges and Immunities Clause, this Court noted:

> The Privileges and Immunities Clause, by making noncitizenship or nonresidence an improper basis for locating a special burden, implicates not only the individual's right to nondiscriminatory treatment but also, perhaps more so, the structural balance essential to the concept of federalism. Since nonresidents

[16] The New Hampshire Supreme Court has questioned on Equal Protection grounds a property tax on Seabrook Station, albeit one based on size and not type of fuel. *Opinion of the Justices*, 118 N.H. 343, 386 A.2d 1273 (1978).

> are not represented in the taxing State's legislative halls, judicial acquiescence in taxation schemes that burden them particularly would remit them to such redress as they could secure through their own State; but "to prevent [retaliation] was one of the chief ends sought to be accomplished by the adoption of the Constitution."

Id. at 662-663 (footnotes and internal citations omitted).

The New Hampshire Seabrook Tax implicates these same concerns and fails for the same reasons.

CONCLUSION

For the foregoing reasons, this Court should grant the plaintiff States the right to file their original jurisdiction complaint in this Court against the State of New Hampshire.

Respectfully submitted,

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No. _____, Original

In The

Supreme Court Of The United States

October Term, 1991

STATE OF CONNECTICUT,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

Plaintiffs,

v.

STATE OF NEW HAMPSHIRE

Defendant.

ADDENDUM

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SUBCHAPTER II – REGULATION OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE

§ 824. Declaration of policy; application of subchapter

(a) Federal regulation of transmission and sale of electric energy

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) Use or sale of electric energy In Interstate commerce

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the

transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) The provisions of sections 824i, 824j, and 824k of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with respect to such provisions. Compliance with any order of the Commission under the provisions of section 824i or 824j of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce

For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) "Sale of electric energy at wholesale" defined

The term "sale of electric energy at wholesale" when used in this subchapter, means a sale of electric energy to any person for resale.

(e) "Public utility" defined

The term "public utility" when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities sub-

ject to such jurisdiction solely by reason of section 824i, 824j, or 824k of this title).

(f) United States, State, political subdivision of State, or agency or instrumentality thereof exempt

No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

42 U.S.C. § 2011

Congressional declaration of policy

Atomic energy is capable of application for peaceful as well as military purposes. It is therefore declared to be the policy of the United States that –

(a) the development, use, and control of atomic energy shall be directed so as to make the maximum contribution to the general welfare, subject at all times to the paramount objective of making the maximum contribution to the common defense and security; and

(b) the development, use, and control of atomic energy shall be directed so as to promote world peace, improve the general welfare, increase the standard of living, and strengthen free competition in private enterprise.

42 U.S.C. § 2012

Congressional findings

The Congress of the United States makes the following find-

ings concerning the development, use, and control of atomic energy:

(a) The development, utilization, and control of atomic energy for military and for all other purposes are vital to the common defense and security.

(b) Repealed. Pub.L. 88-489, § 1, Aug. 26, 1964, 78 Stat. 602.

(c) The processing and utilization of source, byproduct, and special nuclear material affect interstate and foreign commerce and must be regulated in the national interest.

(d) The processing and utilization of source, byproduct, and special nuclear material must be regulated in the national interest and in order to provide for the common defense and security and to protect the health and safety of the public.

(e) Source and special nuclear material, production facilities, and utilization facilities are affected with the public interest, and regulation by the United States of the production and utilization of atomic energy and of the facilities used in connection therewith is necessary in the national interest to assure the common defense and security and to protect the health and safety of the public.

(f) The necessity for protection against possible interstate damage occurring from the operation of facilities for the production or utilization of source or special nuclear material places the operation of those facilities in interstate commerce for the purposes of this chapter.

(g) Funds of the United States may be provided for the development and use of atomic energy under conditions which will provide for the common defense and security and promote the general welfare.

(h) Repealed. Pub.L. 88-489, § 2, Aug. 26, 1964, 78 Stat. 602.

(i) In order to protect the public and to encourage the development of the atomic energy industry, in the interest of the general welfare and the common defense and security, the United States may make funds available for a portion of the damages suffered by the public from nuclear incidents, and may limit the liability of those persons liable for such losses.

42 U.S.C. § 2013

Purpose of chapter

It is the purpose of this chapter to effectuate the policies set forth above by providing for –

(a) a program of conducting, assisting, and fostering research and development in order to encourage maximum scientific and industrial progress;

(b) a program for the dissemination of unclassified scientific and technical information and for the control, dissemination, and declassification of Restricted Data, subject to appropriate safeguards, so as to encourage scientific and industrial progress;

(c) a program for Government control of the possession, use, and production of atomic energy and special nuclear material, whether owned by the Government or others, so directed as to make the maximum contribution to the common defense and security and the national welfare, and to provide continued assurance of the Government's ability to enter into and enforce agreements with nations or groups of nations for the control of special nuclear materials and atomic weapons;

(d) a program to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public;

(e) a program of international cooperation to promote the common defense and security and to make available to cooperating nations the benefits of peaceful applications of atomic energy as widely as expanding technology and considerations of the common defense and security will permit; and

(f) a program of administration which will be consistent with the foregoing policies and programs, with international arrangements, and with agreements for cooperation, which will enable the Congress to be currently informed so as to take further legislative action as may be appropriate.

Connecticut General Statutes § 16-19

Sec. 16-19. Amendment of rate schedule; investigations and findings by department; hearings; deferral of municipal rate increases; refunds; notice of application for rate amendment, interim rate amendment and reopening of rate proceeding. (a) No public service company may charge rates in excess of those previously approved by the authority or the department of public utility control except that any rate approved by the public utilities commission or the authority shall be permitted until amended by the authority or the department, that rates not approved by the authority or the department may be charged pursuant to subsection (b) of this section, and that the hearing requirements with respect to adjustment clauses are as set forth in section 16-19b. Each public service company shall file any proposed amendment of its existing rates with the department in such form and in accordance with such reasonable regulations as the department may prescribe. Each electric, gas or telephone company filing a proposed amendment shall also file with the department an estimate of the effects of the amendment, for various levels of consumption, on the household budgets of high and moderate income customers and customers having household incomes not more than one hundred fifty per cent of the federal poverty level. Each electric company shall also file such an estimate for space heating customers. Each water company, except a water

company that provides water to its customers less than six consecutive months in a calendar year, filing a proposed amendment, shall also file with the department a plan for promoting water conservation by customers in such form and in accordance with a memorandum of understanding entered into by the department pursuant to section 4-67e. Each public service company shall notify each customer who would be affected by the proposed amendment, by mail, at least one week prior to the public hearing thereon, that an amendment has been or will be requested. Such notice shall also indicate (1) the department of public utility control telephone number for obtaining information concerning the schedule for public hearings on the proposed amendment and (2) whether the proposed amendment would, in the company's best estimate, increase any rate or charge by twenty per cent or more, and, if so, describe in general terms any such rate or charge and the amount of the proposed increase, provided no such company shall be required to provide more than one form of the notice to each class of its customers. In the case of a proposed amendment to the rates of any public service company, the department shall hold a public hearing thereon, except as permitted with respect to interim rate amendments by subsection (d) and subsection (g) of this section, and shall make such investigation of such proposed amendment of rates as is necessary to determine whether such rates conform to the principles and guidelines set forth in section 16-19e, or are unreasonably discriminatory or more or less than just, reasonable and adequate, or that the service furnished by such company is inadequate to or in excess of public necessity and convenience. The department, if in its opinion such action appears necessary or suitable in the public interest may, and, upon written petition or complaint of the state, under direction of the governor, shall, make the aforesaid investigation of any such proposed amendment which does not involve an alteration in rates. If the department finds any proposed amendment of rates to not conform to the principles and guidelines set forth in section 16-19e, or to be unreasonably discriminatory or more or less than just, reasonable and adequate to enable such company to provide properly for the public con-

venience, necessity and welfare, or the service to be inadequate or excessive, it shall determine and prescribe, as appropriate, an adequate service to be furnished or just and reasonable maximum rates and charges to be made by such company. In the case of a proposed amendment filed by an electric, gas or telephone company, the department shall also adjust the estimate filed under this subsection of the effects of the amendment on the household budgets of the company's customers, in accordance with the rates and charges approved by the department. The department shall issue a final decision on each rate filing within one hundred fifty days from the proposed effective date thereof, provided it may, before the end of such period and upon notifying all parties and intervenors to the proceedings, extend the period by thirty days.

(b) If the department has not made its finding respecting an amendment of any rate within one hundred fifty days from the proposed effective date of such amendment thereof, or within one hundred eighty days if the department extends the period in accordance with the provisions of subsection (a) of this section, such amendment may become effective pending the department's finding with respect to such amendment upon the filing by the company with the department of assurance satisfactory to the department, which may include a bond with surety, of the company's ability and willingness to refund to its customers with interest such amounts as the company may collect from them in excess of the rates fixed by the department in its finding or fixed at the conclusion of any appeal taken as a result of a finding by the department.

(c) Upon conclusion of its investigation of the reasonableness of any proposed increase of rates, the department shall order the company to refund to its customers with interest any amounts the company may have collected from them during the period that any amendment permitted by subsection (b) of this section was in force, which amounts the department may find to have been in excess of the rates fixed by the department in its finding or fixed at the conclusion of any appeal taken as a result of a finding by the department. Any such

refund ordered by the department shall be paid by the company, under direction of the department, to its customers in such amounts as are determined by the department.

(d) Nothing in this section shall be construed to prevent the department from approving an interim rate increase, if the department finds that such an interim rate increase is necessary to prevent substantial and material deterioration of the financial condition of a public service company, to prevent substantial deterioration of the adequacy and reliability of service to its customers or to conform to the applicable principles and guidelines set forth in section 16-19e, provided the department shall first hold a special public hearing on the need for such interim rate increase and the company, at least one week prior to such hearing, notifies each customer who would be affected by the interim rate increase that such an increase is being requested. The company shall include the notice in a mailing of customer bills, unless such a mailing would not provide timely notice, in which case the department shall authorize an alternative manner of providing such notice. Any such interim rate increase shall only be permitted if the public service company submits an assurance satisfactory to the department, which may include a bond with surety, of the company's ability and willingness to refund to its customers with interest such amounts as the company may collect from such interim rates in excess of the rates approved by the department in accordance with subsection (a) of this section. The department shall order a refund in an amount equal to the excess, if any, of the amount collected pursuant to the interim rates over the amount which would have been collected pursuant to the rates finally approved by the department in accordance with subsection (a) of this section or fixed at the conclusion of any appeal taken as a result of any finding by the department. Such refund ordered by the department shall be paid by the company to its customers in such amounts and by such procedure as ordered by the department.

(e) If the department finds that the imposition of any increase in rates would create a hardship for a municipality,

because such increase is not reflected in its then current budget, or cannot be included in the budget of its fiscal year which begins less than five months after the effective date of such increase, the department may defer the applicability of such increase with respect to services furnished to such municipality until the fiscal year of such municipality beginning not less than five months following the effective date of such increase; provided the revenues lost to the public service company through such deferral shall be paid to the public service company by the municipality in its first fiscal year following the period of such deferral.

(f) Any public service company, as defined in section 16-1, filing an application with the department of public utility control to reopen a rate proceeding under this section, which application proposes to increase the company's revenues or any rate or charge of the company by five per cent or more, shall, not later than one week prior to the hearing under the reopened proceeding, notify each customer who would be affected thereby that such an application is being filed. Such notice shall indicate the rate increases proposed in the application. The company shall include the notice in a mailing of customer bills, unless such a mailing would not provide timely notice to customers of the reopening of the proceeding, in which case the department shall authorize an alternative manner of providing such notice.

(g) The department shall hold a special public hearing on the need for an interim rate decrease (1) when a public service company has, for six consecutive months, earned a return on equity which exceeds the return authorized by the department by at least one percentage point, (2) if it finds that any change in municipal, state or federal tax law creates a significant increase in a company's rate of return, or (3) if it finds that a public service company may be collecting rates which are more than just, reasonable and adequate, as determined by the department, provided the department shall require appropriate notice of hearing to the company and its customers who would be affected by an interim rate decrease in

such form as the department deems reasonable. At such hearing, the company shall be required to demonstrate to the satisfaction of the department that earning such a return on equity or collecting rates which are more than just, reasonable and adequate is directly beneficial to its customers. At the completion of such hearing, the department may order an interim rate decrease if it finds that such return on equity or rates exceed a reasonable rate of return or are more than just, reasonable and adequate as determined by the department. Any such interim rate decrease shall be subject to a customer surcharge if the interim rates collected by the company are less than the rates finally approved by the department or fixed at the conclusion of any appeal taken as a result of any finding by the department. Such surcharge shall be assessed against customers in such amounts and by such procedure as ordered by the department.

(h) The department shall review the effects of the federal Tax Reform Act of 1986 on public service companies having seventy-five thousand customers or more and shall report its findings and recommendations to the joint standing committee of the general assembly having cognizance over matters relating to energy and public utilities not later than January 8, 1988.

Connecticut General Statutes § 16-19a

Sec. 16-19a. Periodic review, investigation, hearing re gas and electric companies' rates and service. The department of public utility control shall, at intervals of not more than four years from the last previous general rate hearing of each gas and electric company having more than seventy-five thousand customers, conduct a complete review and investigation of the financial and operating records of each such company and hold a public hearing to determine whether the rates of each such company are unreasonably discriminatory or more or less than just, reasonable and adequate, or that the service furnished by such company is inadequate to or in excess of public neces-

sity and convenience or that the rates do not conform to the principles and guidelines set forth in section 16-19e . In making such determination, the department shall consider the gross and net earnings of such company since its last previous general rate hearing, its retained earnings, its actual and proposed capital expenditures, its advertising expenses, the dividends paid to its stockholders, the rate of return paid on its preferred stock, bonds, debentures and other obligations, its credit rating, and such other financial and operating information as the department may deem pertinent.

Massachusetts General Laws Chapter 164 § 94

§ 94. Schedules of rates, prices and charges: contracts; filing; proposed changes; notices; investigations; hearing

Gas and electric companies shall file with the department schedules, in such form as the department shall from time to time prescribe, showing all rates, prices and charges to be thereafter charged or collected within the commonwealth for the sale and distribution of gas or electricity, together with all forms of contracts thereafter to be used in connection therewith. Rates, prices and charges in such a schedule may, from time to time, be changed by any such company by filing a schedule setting forth the changed rates, prices and charges, but until the effective date of any such change no different rate, price or charge shall be charged, received or collected by the company filing such a schedule from those specified in the schedule then in effect; provided, that a company may continue to charge, receive and collect rates, prices and charges in accordance with a contract heretofore lawfully entered into, or, until the department otherwise orders, after notice to the company and a public hearing and determination that public interest so requires, may sell and distribute gas or electricity under a special contract hereafter made at rates or prices differing from those contained in a schedule in effect, providing a copy of the contract in each instance is filed with the department, except that a contract of a company whose sole

business in the commonwealth is the supply of electricity in bulk need not be filed except as may be required by the department. Whenever the department receives notice of any changes proposed to be made in any schedule filed under this chapter which represent a general increase in rates, prices and charges for gas or electric service, it shall notify the attorney general of the same forthwith, and shall thereafter hold a public hearing and make an investigation as to the propriety of such proposed changes after first causing notice of the time, place and the subject matter of such hearing to be published at least twenty-one days before such hearing in such local newspapers as the department may select. Unless the department otherwise authorizes, the rates, prices and charges set forth in such a schedule shall not become effective until the first day of the month next after the expiration of fourteen days from the filing thereof. Such rates, prices and charges shall apply to the consumption shown by meter readings made after the effective date of such rates, prices and charges, unless the department otherwise orders. So much of said schedules shall be printed in such form and distributed and published in such manner as the department may require.

The department, either upon complaint or upon its own motion, may investigate the propriety of any proposed rate, price or charge and may, pending such investigation and decision thereon, by order served upon the company affected thereby, suspend the taking effect thereof, from time to time, but not for a period longer than ten months beyond the time when such rate, price or charge would otherwise become effective. An order by the department directing a change in any schedule filed shall have the same effect as if a schedule with such changes were filed by the company, and shall become effective from such time as the department shall order.

Unless the department otherwise orders, all contracts for the sale of gas or electricity by gas or electric companies, except contracts for sale by a company whose sole business in this commonwealth is the supply of electricity in bulk, shall be filed with the department and shall not become effective

until thirty days after filing. The department may investigate the propriety of any such contract, both before and after such contract has become effective, and may, after notice and a public hearing, make such order relative to the rates, prices, charges and practices covered by such contract as the public interest requires. Any order made under the provisions of this section or of section ninety-three, may be enforced as provided in section seventy-nine. This section shall not apply to contracts for the sale of electricity to an electric company made in accordance with the provisions of section ninety-four A except as therein provided.

Massachusetts General Laws Chapter 164 § 94G

§ 94G. Proposed performance program; unit heat rate audit; public hearing; periodic report; deductions; fuel charge; base rates; rates and regulations

(a) At least once a year, on dates set by the department, each electric company having a fuel charge approved by the department shall file with the department and simultaneously with the attorney general a proposed performance program relating to fuel procurement and use. Such program shall describe for the time period or periods designated reasonably attainable targets which shall include a thermal efficiency target for the performance of the company, consistent with reasonable regional power exchange requirements; provided, however, that such requirements do not impede an individual utility within the regional power exchange system from producing and distributing electric power at optimum efficiency and economy in a manner not detrimental to the public interest. Such program also shall provide for the efficient and cost-effective operation of individual generating units by an electric utility company in meeting the minimum needs of each unit of said company to maintain sufficient reserves of power for purposes of reliability and efficiency. Such program also shall describe the historic data, industry standards or reports, simulation models or other information and techniques upon which projections of the company's performance are based and shall include, as goals for individual and system plant performance, availability, equivalent availability, capacity factor, forced outage rate, heat rate on a unit by unit basis and such other factors or operating characteristics required by the department. Any such program may specify a value or a range of values for the operating characteristic in question and shall reflect operating conditions when overall performance is optimized.

Each company shall provide with the above filing the results of a unit by unit heat rate audit supervised and certified by the department or such independent auditing or engineering firm designated by the department and a statement prescribed under the pains and penalties of perjury that said company has used all reasonable means to procure the lowest possible costs for all fuel and purchased power. In addition, the department shall require each company to file as part of any review or investigation pursuant to this section, all fuel contracts, invoices and agreements with fuel suppliers, and such other information and reports as the department deems necessary. The department also shall require each company to file any reports of tests, studies or audits conducted or compiled for filing with or for review by any regional power exchange, research association or federal agency to which said company is affiliated, associated, or is required to report to, as the case may be. The department shall review, and may investigate upon its own motion or upon motion of the attorney general, any agreements, practices, and procedures which exist between the electric company and any of its suppliers of fuel or purchased power to determine whether such agreement, practices and procedures are in the best interest of the retail customers of such company.

Upon receipt of such filing, the department shall, after public notice, hold a public hearing to review the proposed program. In its proceedings to evaluate a performance program, the department may consider studies, analyses, audits and other tests relative to the program or any part thereof,

any of which the department may perform itself or require the company to provide. The department shall within ninety days of such filing approve such program for each company as proposed or as modified by order of the department after such hearing. In no event shall such program allow for the recovery of zero power costs as defined herein.

Each such electric company shall file with the department, with the frequency and in the standardized form established by the department, data and reports on the actual unit by unit and system performance of the company with respect to each target set forth in the approved performance program. If any such periodic report indicates that actual system performance varied from the approved targets, upon order by the department or petition of any party to the proceeding the company shall, at the next following fuel charge hearing under subsection (b), present evidence explaining such variance. In the course of such hearing, the department shall investigate such variance, may otherwise inquire into an issue related to the procurement or use of fuel or purchased power included in the fuel charge and properly raised by any party, and, in either event, shall make a finding whether the company failed to make all reasonable or prudent efforts consistent with accepted management practices, safety and reliability of electric service and reasonable regional power exchange requirements to achieve the lowest possible overall costs to the customers of the company for the procurement and use of fuel and purchased power included in the fuel charge. If the department finds that the company has been unreasonable or imprudent in such performance, in light of the facts which were known or should reasonably have been known by the company at the time of the actions in question, it shall deduct from the fuel charge proposed for the next quarter or such other period as it deems proper the amount of those fuel costs determined by the department to be directly attributable to the unreasonable or imprudent performance. The department may continue the hearing into any such performance issue for a period of up to ninety days after its commencement, during which period the department shall render its decision; pro-

vided, however, that any such continuance shall not delay the approval by the department of any proposed fuel charges. At such time or times, the department shall specify, the portion, if any, of the fuel charges which is conditionally approved pending resolution of the performance issue. If the hearing results in a finding of unreasonable or imprudent performance, the department shall deduct from the fuel charge for the next following quarter the imprudently incurred fuel costs with interest calculated at such rate and for such period as the department deems appropriate to make the customers whole.

Any deductions ordered by the department pursuant to this subsection shall be subject to judicial review and the electric company shall be made whole with interest if the department's finding of imprudence is overruled. The department may allow for the deduction of imprudently incurred fuel costs from the fuel charge over a fixed period of time, as determined to be appropriate by the department, whenever, in its judgment, the full deduction, as provided in the preceding paragraph, of such costs would jeopardize the financial integrity of the company or otherwise be contrary to the public interest.

All materials required to be filed with the department pursuant to this section shall be in such standardized form and with such frequency as established by the department.

(b) The department may approve an itemized fuel charge in rates filed by electric companies to reflect changes in prudently incurred reasonable costs of fuels and power purchased by such companies. Such fuel charge may be based on reasonable estimates of the total costs of fuel to be used in generating or supplying electricity to customers and power purchased for resale to customers, as appropriate in accordance with the company's fuel charge rate schedule, during the quarter in which the charge shall apply. The burden of proof shall be upon the utility company to demonstrate the reasonableness of energy expenses sought to be recovered through the fuel charge. The fuel charge shall be billed to all customers of the company at uniform per kilowatt-hour rates and the

total amount of such costs to a customer shall be itemized on the customer's bill. Such rates may be time-differentiated but shall not otherwise differ among classes of customers or by the amount of a customer's usage.

Electric companies shall file quarterly under the pains and penalties of perjury, proposed fuel charges with the department which shall be filed simultaneously with the attorney general. No such fuel charge shall be billed to customers without the specific approval of the department after a public hearing. Such hearing shall be held within fourteen days after the filing by the electric company of a proposed fuel charge. Upon receipt of such a filing, the department shall forthwith cause notice of the time, place and subject matter of the public hearing to be published once at least seven days prior to such hearing in a newspaper of general circulation in the area served by the filing company. At such hearing the department shall consider and investigate the filing of the company with all related materials and reports of actual fuel and purchased power costs and fuel charge revenues for the three months preceding the month of the filing which shall be subscribed and sworn to by the company under the pains and penalties of perjury. The department shall render its decision within thirty days following the commencement of such hearing, except as provided under subsection ninety-four G (a). The approved fuel charge shall reflect a reconciliation for any differences between the fuel charge revenues and actual fuel and purchased power costs, less zero power costs as defined herein, for the three months preceding the month of the filing as well as estimated differences for the month of the filing and all other adjustments determined by the department pursuant to this subsection and subsection (a).

In the event of overcollection of fuel charges by a utility for the preceding three month period, the department shall determine what part, if any, of such overcollection is attributable to the overestimation of unit fuel prices by the utility and shall order that interest on that part, calculated at a rate to be determined by the department, be returned to the rate-

payers; provided, however, that such rate of interest shall be applied to that part of the overcollection only in the event that the estimates of unit fuel prices for the preceding three months exceeded the actual unit fuel price by more than five per cent. Any such overcollection and interest payments shall be returned to the ratepayers in the aforementioned reconciliation process at a fuel charge hearing held quarterly pursuant to the provisions of this section. In no case shall such interest payments be included in any fuel charge or in the normal operating costs of each such electric utility company.

Electric companies filing fuel charges shall submit monthly data in a standardized format determined by the department, of fuel costs, purchased power charges with the accompanying service classification for each type of power received or dispatched, zero power costs, kilowatt-hour usages, revenues derived from fuel charges and any other such information as the bureau may require for monitoring such fuel and purchased power costs. If, after review of said data, the bureau determines that a utility company is operating an individual generating unit in a manner inconsistent with its most recently approved annual performance program, or otherwise does not provide its consumers with energy in an efficient and cost-effective manner, the bureau shall notify the department of its findings. Upon receipt of such notification, the department shall order the company to present evidence, at the next following fuel charge hearing held pursuant to this section, explaining such variance or submit plans and specifications to repair or improve said unit. In the course of such hearings, the department shall investigate such variance and if the department finds that the company has been unreasonable or imprudent in such performance, in light of the facts which were known or should reasonably have been known by the company at the time of the actions in question, it shall deduct from the fuel charge proposed for the next quarter the amount of those fuel costs determined by the department to be directly attributable to the company's defective operation of such generating unit above its minimum needs to maintain sufficient reserves of power for purposes of reliability and efficiency.

The department shall also take additional steps as it deems necessary to ensure compliance with this subsection. Such monthly data, all electric company fuel and power supply contracts and agreements, fuel invoices and all reports required pursuant to subsection (a) shall be included with, or submitted prior to, the company's fuel charge filing and shall become part of the department's records.

Upon request of an electric company, the department, after public hearing, may approve an interim adjustment in the fuel charge then in effect for such company upon a finding that actual fuel costs exceed the approved quarterly estimates by more than ten per cent, and upon a finding that the company has demonstrated by clear and convincing evidence that all reasonably possible efforts were made to meet the standards established pursuant to subsection (a). Whenever an electric utility company determines that collections from the approved quarterly fuel charge will exceed the actual fuel costs of an electric company by more than ten per cent, said electric utility company shall forthwith notify the department and the department may, after public hearing, approve an interim adjustment in the fuel charge then in effect for such company.

(c) The department shall from time to time review the participation of an electric company in a regional power exchange and report its findings to the clerk of the senate and the clerk of the house, along with its recommendations. The department may petition the appropriate federal regulatory authority to implement its findings and recommendations.

(d) Upon request filed by an electric company, the department may allow interim adjustments to the base rates of such company to reflect extraordinary increases in operating, maintenance or capital costs for fuel procurement or the improvement of efficiency in operating generation facilities whenever the department finds by clear and convincing evidence after a public hearing that such increased expenditures were neither incurred as a result of company imprudence nor incurred

in the ordinary course of business and would result in a net reduction in the cost of electric service by virtue of a reduction in fuel or purchased power costs in excess of the costs of such increased expenditures.

Nothing in this subsection shall be interpreted to authorize such interim adjustments to the base rates of any electric company for operation and maintenance expenses incurred as a result of a forced or unscheduled outage. Nothing herein shall be interpreted to authorize such interim adjustments for the immediate recovery by a utility company of the costs of construction work in progress.

(e) The department may promulgate such rules and regulations as it deems appropriate to carry out the provisions of this section and may, after public hearing, incorporate the use of any factors, in addition to and not inconsistent with factors set forth in this section, in its considerations under any subsection hereof.

(f) For the purpose of this section, the following terms shall have the following meanings: –

"Line losses", the unavoidable losses of electricity that occur during the transmission and distribution of electric power.

"Retail customer", any purchaser of electricity regulated by the department.

"Zero power costs", fuel costs attributable to a utility company's generation of electricity which was neither purchased nor consumed by a retail customer of said company and is in excess of minimum needs to maintain sufficient reserves of power for purposes of reliability and efficiency, as determined by the fuel charge monitoring bureau, and to maintain the most economical levels of operation, consistent with reasonable regional power exchange requirements; provided, however, that such electricity shall not include line losses as defined herein.

New Hampshire Revised Statutes Chapter 83-C Prior to Amendments by 1991 N.H. Laws c. 354

FRANCHISE TAX

83-C:1 Terms Defined.
83-C:2 Tax Imposed.
83-C:3 Returns and Declarations.
83-C:4 Payments.
83-C:5 Additional Returns.
83-C:6 Extension of Time for Returns.
83-C:7 Utility Records.
83-C:8 Failure to Make Returns; False Returns or Records.
83-C:9 Adjustments; Procedure.
83-C:10 Appeal.
83-C:11 Witnesses.
83-C:12 Fees.
83-C:13 Collection.
83-C:14 Disposition of Revenue.
83-C:15 Saving Clause.

83-C:1 Terms Defined. The following terms when used in this chapter shall have the meanings set forth below, except when the context in which they are used requires a different meaning:

I. "Franchise tax," hereinafter referred to as the "tax," means the tax computed on the franchises of a public utility under this chapter on the business conducted by such utility within this state.

II. "Public utility" means every person, partnership, association and corporation except municipal corporation, engaged within this state in the manufacture, generation, distribution, transmission, or sale of gas or electric energy.

III. "Commissioner" means the commissioner of revenue administration.

IV. "Gross receipts" means all receipts received or accrued of the public utility from the sale of gas or electricity pursuant to franchises granted by this state. Gross receipts do not include receipts from sales of gas or electricity for use outside the state, or receipts from sales of gas or electricity to another public utility which is also subject to the payment of this tax.

V. "Taxable year" means the calendar year.

83-C:2 Tax Imposed. Every public utility shall pay to the state, annually, a special tax upon the franchise exercised by such public utility within the state, such tax to be assessed at a rate equal to one percent of the gross receipts such public utility derives in this state during the calendar year of assessment from the exercise of such franchise.

83-C:3 Returns and Declarations.

I. On or before March 15 in each year in which a public utility as the holder of such franchise exercises or proposes to exercise the privileges and accepts or proposes to accept the obligations conferred thereby, it shall file with the commissioner on a form prescribed by the commissioner, a return of its gross receipts for the previous calendar year, together with such additional information as the commissioner shall require. All returns shall be signed by its authorized representative, subject to the pains and penalties of perjury.

II. At the same time the return is filed, as required by paragraph I, every public utility as defined in RSA 83-C:1 shall, in addition, file a declaration of its estimated gross receipts and estimated franchise tax for its subsequent taxable period.

III. For the calendar year 1983, the public utility shall be required to file a return covering the period from July 1, 1983, through December 31, 1983, on or before March 15, 1984.

Such return shall also include a statement of income as required under RSA 83-B:3 covering the period from January 1, 1983, through June 30, 1983. At the same time such return is filed, every public utility as defined in RSA 83-C:1, II shall, in addition, file a declaration of its estimated gross receipts and estimated franchise tax for the calendar year 1984.

83-C:4 Payments. One quarter of the public utility's estimated franchise tax for the subsequent taxable period is due and payable on the fifteenth day of the fourth month of the subsequent taxable year; ¼ is due and payable on the fifteenth day of the sixth month of the subsequent taxable year; ¼ is due and payable on the fifteenth day of the ninth month of the subsequent taxable year; and ¼ is due and payable on the fifteenth day of the twelfth month of the subsequent taxable year. If the return required by RSA 83-C:3, I shows an additional amount to be due, such additional amount is due and payable at the time the return is filed. If such return shows an overpayment of the tax due, the commissioner shall refund such overpayment to the utility or shall allow the utility a credit against a subsequent payment or payments due, to the extent of the overpayment, at the utility's option.

83-C:5 Additional Returns. When the commissioner has reason to believe that a utility has failed to file a return or to include any part of its gross receipts in a filed return, the commissioner may require the utility to file a return or a supplementary return showing such additional information as the commissioner prescribes. Upon the receipt of the supplementary return, or if none is received within the time set by the commissioner, the commissioner may find and assess the amount due upon the information that is available. If any tax or addition to tax is not paid when due, interest at the rate of 1¼ percent per month shall be added to it from the date due until the time of payment. The utility shall also be liable for any other additional charges and penalties imposed by law.

83-C:6 Extension of Time for Returns. For good cause, the commissioner may extend the time within which a utility is required to file a return, and if such return is filed during the period of extension no penalty or late payment charge may be imposed for failure to file the return at the time required by this chapter, but the utility shall be liable for interest at the rate of 1¼ percent per month on payments not made when they otherwise would be due but for the grant of extension.

83-C:7 Utility Records. Every utility shall:

I. Keep such records as may be necessary to determine the amount of its liability under this chapter;

II. Preserve such records for the period of 3 years or until any litigation or prosecution hereunder is finally determined;

III. Make such records available for inspection by the commissioner or his authorized agents, upon demand, at reasonable times during regular business hours.

Whoever violates any of the provisions of this section shall be guilty of a misdemeanor if a natural person, or guilty of a felony if any other person.

83-C:8 Failure to Make Returns; False Returns or Records. The following acts or omissions are unlawful:

I. Failing to make any return or declaration required by this chapter;

II. Making, causing to be made or permitting to be made any false or fraudulent return or declaration or false statement in any return or declaration, with intent to defraud the state or to evade payment of the tax or any part of the tax imposed by RSA 83-C:2.

III. Making, causing to be made or permitting to be made

any false entry in books, records or accounts with intent to defraud the state or to evade the payment of the tax or any part of the tax imposed by RSA 83-C:2 or keeping, causing to be kept or permitting to be kept more than one set of books, records or accounts with such intent.

Whoever violates any of the provisions of this section shall be guilty of a misdemeanor if a natural person, or guilty of a felony if any other person.

83-C:9 Adjustments; Procedure. The commissioner is empowered to determine whether there has been error in the assessment of the tax imposed by RSA 83-C:2, in accordance with the following provisions:

I. The utility may demand such a determination in writing, within 3 years after the tax was due;

II. The commissioner may, on his own motion, undertake such a determination upon written notice to the utility given within 3 years after the tax was due or paid, whichever is later.

III. After hearing, if requested by the utility, the commissioner shall affirm or shall increase or decrease the tax theretofore assessed. Any increase ordered by the commissioner shall be assessed against the utility and shall carry interest as prescribed in RSA 21-J:28. Any decrease ordered by the commissioner shall, with interest pursuant to RSA 21-J:28, from the date the tax was paid, be credited against any unpaid tax then due from the utility and any balance due the utility shall be certified to the state treasurer who shall pay the balance to the utility. Such credit and payment together may not exceed the amount of the tax originally paid.

83-C:10 Appeal. Within 30 days after notice of any adjustment of tax by the commissioner under RSA 83-C:9, a utility may appeal the commissioner's determination either by written application to the board of tax and land appeals or by petition to the superior court in the county in which

the utility has a place of business or resident agent. The board of tax and land appeals or the superior court, as the case may be, shall determine the correctness of the commissioner's action de novo.

83-C:11 Witnesses. At any hearing held pursuant to this chapter, the commissioner or his designee shall have the power to compel the attendance of witnesses and the production of books, records, papers, vouchers, accounts and documents of any public utility believed by the commissioner or his designee to be liable for the payment of a tax under this chapter, or of any person believed to have information or knowledge pertinent to any matter under investigation or examination by the commissioner.

83-C:12 Fees. The fees of witnesses required to attend any hearing shall be the same as those allowed witnesses in the superior court and shall be paid by the state.

83-C:13 Collection. The department of revenue administration shall possess all of the powers of a collector of taxes, as defined in RSA 80, to collect any overdue tax.

83-C:14 Disposition of Revenue. The revenue derived hereunder shall be covered into the general funds of the state.

83-C:15 Saving Clause. If any part or parts of this chapter shall be held to be invalid, such invalidity shall not affect the validity of the remaining parts of this chapter.

New Hampshire Revised Statutes Chapter 77-A prior to Amendments by 1991 N.H. Laws c. 354

BUSINESS PROFITS TAX

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77-A19 Lien for Tax.
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77-A:21 Severability.

77-A:1 Definitions. When appearing in this chapter:

I. "Business organization" means any enterprise, whether corporation, partnership, proprietorship, association, business trust, real estate trust or other form of organization; organized for gain or profit, carrying on any business activity within the state, except such enterprises as are expressly made exempt from income taxation under the United States Internal Revenue Code as defined in RSA 77-A:1, XX. Each enterprise under this definition shall be subject to taxation under RSA 77-A:2 as a separate entity, unless specifically authorized by this chapter to be treated otherwise, such as, but not limited

to, combined reporting. The use of consolidated returns as defined in the United States Internal Revenue Code as defined in RSA 77-A:1, XX is not permitted. A partnership, estate, trust, "S" corporation, real estate investment trust, regulated investment company, or any other such entity whose net income is reportable by the true owners either directly or indirectly shall be subject to tax at the entity level, and no part of such earnings or loss shall be included in the calculation of the gross business profits of the owners of such entity.

II. "Commissioner" means the commissioner of revenue administration.

III. "Gross business profits" means:

(a) In the case of a corporation, except "S" corporations, or any other business organization required to make and file a United States corporation income tax return, or in the case of a corporation which does not make and file a separate United States corporation income tax return for itself because it is a member of an affiliated group pursuant to the provisions of chapter 6 of the United States Internal Revenue Code as defined in RSA 77-A:1, XX, the amount of taxable income as would be determinable under the provisions of the United States Internal Revenue Code as defined in RSA 77-A:1, XX before the application of any net operating loss deduction, special deductions shown on line 29 of the federal corporate income tax return, or any other special deductions allowable only to a certain class of corporate taxpayer.

(b) In the case of "S" corporations or any other business organizations required to make and file an "S" corporation return, the net profit from all business activity determined in accordance with rules adopted by the department of revenue administration under RSA 541-A.

(c) In the case of a partnership or any other business organization required to make and file a United States partnership return of income, the amount of ordinary income as

would be determinable under the provisions of the United States Internal Revenue Code as defined in RSA 77-A:1, XX increased by the amounts shown as payments to partners on the federal partnership return of income, the net amount of any gains from the sale of partnership assets, items of income specifically allocated to partners and decreased by any deductions specifically allocated to partners or losses on the sale of partnership assets.

(d) In the case of a proprietorship, the amount of net profit or loss from a business, profession, rental, or farming activities as would be determinable under the provisions of the United States Internal Revenue Code as defined in RSA 77-A:1, XX adjusted by the amount of any gains or losses from the sale of assets held or used in business activity.

(e) In the case of a trust, estate, or any other business organization engaging in business activity, the amount of net profit from such business activity and the net amount of any gains from the sale of assets held for use in business activity.

(f) In the case of any business organization which is part of a water's edge combined group and which does not make or file a United States income tax return or schedule under subparagraphs (a)-(d), the amount of net income as would be determinable under the provisions of the United States Internal Revenue Code as defined in RSA 77-A:1, XX and applied within the concepts of RSA 77-A for such business organizations.

IV. "Taxable business profits" means gross business profits adjusted by the additions and deductions provided in RSA 77-A:4 and then adjusted by the method of apportionment provided in RSA 77-A:3.

V. "Taxable period" means the calendar year or fiscal year which the taxpayer uses for United States income tax purposes, or that part of a year for which a return is made.

VI. "Gross business income" means all income for federal

income tax purposes from whatever source derived in the conduct of business activity, including but not limited to gross proceeds from sales, compensation for rendering services, gross proceeds realized from trading in stocks, bonds, or other evidences of indebtedness, gross proceeds realized from sale of assets used in trade or business, interest, discount, gross rents, royalties, fees, commissions, dividends, without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes, or any other expense paid or accrued and without any deduction on account of losses.

VII. "Prescribed Filing Date" means the original statutory due date, or approved extended due date.

VIII. "Prescribed Payment Date" means the original statutory due date.

IX. "Qualified charitable contributions" means a charitable contribution of tangible personal property as defined in section 1221(1) of the United States Internal Revenue Code as defined in RSA 77-A:1, XX, but only if all of the following conditions are met:

(a) The contribution is either to an educational organization which is described in section 170(b)(1)(A)(ii) of the United States Internal Revenue Code as defined in RSA 77-A:1, XX or to an institution of higher education as defined in section 3304(f) of the United States Internal Revenue Code as defined in RSA 77-A:1, XX or to both an educational organization and an institution of higher education as defined in this subparagraph.

(b) The contribution is made not later than one year after the date the manufacture or purchase of the property is substantially completed.

(c) The original use of the property is by the donee.

(d) The property is a computer, scientific equipment, or apparatus, all of the use of which by the donee is directly for the education of students in the state of New Hampshire.

(e) The property is not transferred by the donee in exchange for money, other property, or services.

(f) The taxpayer receives from the donee a written statement representing that its use and disposition of the property shall be in accordance with these provisions.

(g) The contribution is made between July 1, 1983, and June 30, 1984.

X. "Qualified research contribution" means a charitable contribution by a taxpayer of tangible personal property as defined in section 1221(1) of the United States Internal Revenue Code as defined in RSA 77-A:1, XX, but only if all of the following conditions are met:

(a) The contribution is either to an educational organization which is described in section 170(b)(1)(A)(ii) of the United States Internal Revenue Code as defined in RSA 77-A:1, XX or to an institution of higher education as defined in section 3304(f) of the United States Internal Revenue Code as defined in RSA 77-A:1, XX or to both an educational organization and an institution of higher education as defined in this subparagraph.

(b) The contribution is made not later than 2 years after the date the manufacture or purchase of the property is substantially completed.

(c) The original use of the property is by the donee.

(d) The property is scientific equipment or apparatus, substantially all of the use of which by the donee is for research or experimentation, or for research training in physical or biological sciences for students.

(e) The property is not transferred by the donee in exchange for money, other property, or services.

(f) The taxpayer receives from the donee a written statement representing that its use and disposition of the property shall be in accordance with these provisions.

XI. "Business asset" means any tangible or intangible property, whether real or personal, previously used, currently used, or available for use in any business activity.

XII. "Business activity" means a group of actions performed by a business organization for the purpose of earning income or profit from such actions and includes every operation which forms a part of, or a step in, the process of earning income or profit from such group of actions. The actions ordinarily include, but are not limited to, the receipt of money, property, or other items of value and the incurring or payment of expenses.

XIII. "Combined net income" means the revenues less expenses as would be determinable under the provisions of the Internal Revenue Code as defined in RSA 77-A:1, XX and applied within the concepts of RSA 77-A for all business organizations conducting a unitary business regardless of whether such business organizations are required to file a federal income tax return.

XIV. "Unitary business" means one or more related business organizations engaged in business activity both within and without this state among which there exists a unity of ownership, operation, and use; or an interdependence in their functions.

XV. "Water's edge combined group" means a group of business organizations as defined in RSA 77-A:1, I operating a unitary business, except for overseas business organizations, as defined in paragraph XIX; provided, however, overseas business organizations shall only be excluded from the definition

of "water's edge combined group" if the following criteria are met:

(a) The taxpayer certifies that transactions conducted between such business organizations and other members of the group are on a comparable basis to transactions between other business organizations owned or controlled by the taxpayer and any members of the water's edge combined group; and

(b) The taxpayer agrees to report to the commissioner any adjustments as finally determined by the United States Internal Revenue Service with respect to such transactions between any related business organizations as may have a bearing on the comparability of transactions referred to in subparagraph (a). These adjustments shall be made to the 80/20 business organizations so that a comparable basis shall be maintained for New Hampshire tax purposes. Such report shall be made in the manner and within the time limits as provided in RSA 77-A:10. Nothing in this paragraph shall exclude from taxation any business organization carrying on business activity within the state.

XVI. "Water's edge method" means the determination of taxable business profits for a group of business organizations conducting a unitary business by adding their combined net income, the additions and deductions provided in RSA 77-A:4 for the members of the group, and apportioning the result as provided in RSA 77-A:3.

XVII. "Foreign dividends" as used in RSA 77-A:3, II means dividend income received from affiliated business organizations, which have 80 percent or more of the average of their payroll and property assignable to a location outside the 50 states and the District of Columbia.

XVIII. "Foreign property, payroll and sales" as used in RSA 77-A:3, II means the property, payroll and sales data of affiliated business organizations which have 80 percent or

more of the average of their payroll and property assignable to a location outside the 50 states and the District of Columbia, and which have paid dividends to a member of the water's edge combined group.

XIX. "Overseas business organizations" means business organizations with 80 percent or more of the average of their payroll and property assignable to a location outside the 50 states and the District of Columbia.

XX. "United States Internal Revenue Code" means:

(a) The United States Internal Revenue Code without the rules, regulations, forms, and procedures of the United States Internal Revenue Service. The rules, regulations, forms and procedures of the United States Internal Revenue Service may, however, be used by the commissioner of revenue administration in formulating rules for adoption under RSA 541-A. This definition shall be operative unless and until a specific statutory exception to its adoption is provided in this chapter, or until the application of one of its provisions is held to violate the New Hampshire constitution.

(b) For all tax years beginning before January 1, 1987, the United States Internal Revenue Code (1954) as amended; and

(c) For all tax years beginning after December 31, 1986, the United States Internal Revenue Code of 1986 in effect on December 22, 1987; and

(d) For all tax years beginning after December 31, 1987, the United States Internal Revenue Code of 1986 in effect on November 10, 1988.

77-A:2 Imposition of Tax. A tax is imposed at the rate of 8 percent upon the taxable business profits of every business organization.

77-A:2-a Minimum Tax Due.

[Repealed 1982, 42:70, eff. July 1, 1982.]

77-A:2-b Conditions for Employment of Only Water's Edge Combination.

I. The commissioner shall determine liability for any business organization subject to the tax imposed under RSA 77-A:2 for the elements of both tax base and apportionment by the water's edge method except as provided in paragraph II.

II. The commissioner shall not be compelled to apply the water's edge method if the taxpayer fails to comply with the rules adopted by the department of revenue administration or the procedural requirements of RSA 77-A.

77-A:3 Apportionment.

I. A business organization which derives gross business profits from business activity both within and without this state, and which is subject to a net income tax, a franchise tax measured by net income, or a capital stock tax in another state or is subject to the jurisdiction of another state to impose a net income tax or capital stock tax upon it, whether or not such tax is actually imposed, shall apportion its gross business profits so as to allocate to this state a fair and equitable proportion of such business profits. Except as provided in this section, such apportionment shall be made on the basis of the following 3 factors, equal weight to be given to each:

(a) The percentage of value of the total real and tangible personal property owned, rented and employed by the business organization everywhere as is owned, rented and employed by it in the operation of its business in this state. Property owned by the business organization shall be valued at its original cost. Property rented by the business organization shall be valued at 8 times the net annual rental rate. Net annual rental rate is the annual rental rate paid by the business organization from subrentals.

(b) The percentage of total compensation paid by the business organization to employees everywhere as is paid by the business organization to employees for services rendered within this state. Such compensation is deemed to be disbursed for services in this state if the service is performed entirely within this state, or if the service is performed both within and without this state and the service performed without this state is incidental to the service within this state, or some of the service is performed in this state and (1) the

base of operations or, if there is no base of operations, the place from which the service is directed or controlled is in this state, or (2) the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual performing such service resides within this state.

(c) The percentage of the total sales, including charges for services, made by the business organization everywhere as is made by it within this state. Sales of tangible personal property are made in this state if the property is delivered or shipped to a purchaser, other than the United States government, within this state regardless of f.o.b. point or other conditions of sale, or the property is shipped from an office, store, warehouse, factory or other place of storage in this state and (1) the purchaser is the United States government, or (2) the business organization is not taxable in the state of the purchaser. Sales other than sales of tangible personal property are in this state if the income-producing activity is performed in this state, or the income-producing activity is performed both in and outside this state and a greater proportion of the income-producing activity is performed in this state than in any other state, based on costs of performance.

II. (a) The average of the 3 percentages in paragraph I shall be applied to the total gross business profits (less foreign dividends) of the business organization to ascertain its gross business profits in this state. If this method of apportionment does not fairly represent the business organization's business activity in this state, the business organization may petition for, or the commissioner may require, in respect to all or any part of the business organization's business activity, if reasonable:

(1) The exclusion of any one or more of the apportionment factors;

(2) The inclusion of one or more additional apportionment factors which will fairly represent the business organization's business activity in the state; or

(3) The employment of any other method to effect an equitable apportionment of the business organization's gross business profits.

(b) For foreign dividends from unitary sources, the following formula shall be used to modify factors relating to included dividends:

(1) Determine a percentage for each dividend payor consisting of dividends paid divided by taxable income which has been computed using United States standards.

(2) Apply this percentage to the dividend payor's foreign property, payroll, and sales.

(3) Sum the results in subparagraph (2) for all dividend payors.

(4) Add the result in subparagraph (3) to the denominators of the combined water's edge group. The numerator will remain the New Hampshire numerator.

(5) Apply the resulting percentage to the foreign dividends.

(6) Add this amount to the amount of New Hampshire taxable business profits computed pursuant to RSA 77-A:3, I and II(a).

III. When 2 or more related business organizations are engaged in a unitary business, as defined in RSA 77-A:1, XIV, a part of which is conducted in this state by one or more members of the group, the income attributable to this state shall be determined by means of the combined apportionment factors of the unitary business group in accordance with paragraphs I and II.

IV. The business organization is entitled to a hearing by the commissioner on request in connection with any change in its apportionment procedure and has the right of appeal from the commissioner's determination as provided in RSA 77-A:14.

77-A:4 Additions and Deductions. The following adjustments shall be made to gross business profits in determining taxable business profits:

I. In the case of a business organization which is subject to taxation under RSA 77, a deduction of such amount of gross business profits as is attributable to income which is taxable or is specifically exempted from taxation under RSA 77.

II. A deduction of such amount of gross business profits as is attributable to income derived from interest on notes, bonds or other securities of the United States.

III. In the case of a proprietorship or partnership, a deduction equal to a fair and reasonable compensation for the personal services of the proprietor or partners actually devoting time and effort in the operation of the enterprise. The purpose of this paragraph is to permit deduction from gross business profits of a proprietorship or partnership only of such amounts as are fairly attributable to the personal services of the proprietor or partners. Such amounts would generally be the amount reported as earned income on federal income tax returns, but would also include compensation for operating rental property, amounts deemed to be reasonable commissions on the sale of property, and other amounts due to services rendered. If there is occasion to determine the reasonableness of a deduction claimed under this paragraph, the commissioner shall consider the claimed deduction in light of compensation for personal services of employees in positions requiring similar responsibility, devotion of time, education and experience in business organizations of similar size, volume and complexity. In addition, the commissioner shall take into account the value of the proprietorship or partnership of the labor of its employees, the proprietor, or any of the partners, and the use of their property and any other factor which may reasonably assist the commissioner in making a determination. Such determination by the commissioner shall be deemed reasonable unless the taxpayer proves to the commissioner, by a preponderance of the evidence upon the

standards set forth in this paragraph and after notice and hearing, that the deduction claimed by the taxpayer is not grossly excessive. Provided, that a taxpayer ascertaining its gross business profits in this state by the allocation procedure established in RSA 77-A:3 is allowed only such percentage of the deductions allowable in paragraphs II, III, and IV as has been applied by it in ascertaining its gross business profits in this state. Provided further that subject to the preceding sentence, a minimum deduction of $3,000 shall be allowed on account of the proprietor or each partner actually devoting time and effort in the operation of the enterprise.

IV. In the case of a corporation which is the parent of an affiliated group pursuant to the provisions of chapter 6 of the United States Internal Revenue Code as defined in RSA 77-A:1, XX, a deduction of such amounts of gross business profits as are derived from dividends paid to the parent by a subsidiary or subsidiaries whose gross business profits have already been subject to taxation under this chapter during the same taxable period. The purpose of this deduction is to prevent double taxation on the identical gross business profits of a controlled corporation or group of corporations and its parents.

V. In the case of a business organization which is a participant in a joint venture which itself is taxable under this chapter or a partnership which is a partner in a second partnership which itself is taxable under this chapter, a deduction of such amounts of gross business profits as are derived from distributions from the joint venture to the business organizations or from the partnership to the second partnership and which have already been subject to taxation under this chapter during the same or an overlapping fiscal period. The purpose of this deduction is to prevent double taxation on the identical gross business profits of a joint venture and its participating business organizations or a partnership which is a partner in a second partnership.

VI. In the case of a corporation which is the parent of a

domestic international sales corporation (DISC) as defined in section 992 of the United States Internal Revenue Code as defined in RSA 77-A:1, XX, a deduction of the distribution to the parent company by the DISC required by the provisions of subsection 995(b)(1)(D) of the Internal Revenue Code as defined in RSA 77-A:1, XX, if the profits from which said distribution is made have already been subject to taxation under this chapter during the same taxable period. The purpose of this deduction is to prevent double taxation on the identical gross business profits of a DISC and its parent company.

VII. In the case of a business organization which takes any deduction for a net income tax, a franchise tax measured by net income, or a capital stock tax assessed by any state or political subdivision, an addition to gross business profits for the amount of all such deductions.

VIII. In the case of a corporation, having adopted a plan of liquidation subsequent to June 30, 1981, which has a nonrecognized gain as a result of the application of the United States Internal Revenue Code (1954) section 337, as amended, or meets the exception requirements allowing the federal nonrecognition provisions of section 337 as provided in section 633 of the Tax Reform Act of 1986, an addition to gross business profits for the amount of such gain.

IX. In the case of a business organization required to adjust a portion of its wages under section 280C of the United States Internal Revenue Code as defined in RSA 77-A:1, XX, a deduction from gross business profits in the amount of such adjustment.

X. In the case of a business organization which receives certain intangible income from non-unitary sources, a deduction from gross business profits for the amount of such income net of related expenses.

XI. A deduction of such amount of gross business profits

as is attributable to foreign dividend gross-up as determined in accordance with section 78 of the United States Internal Revenue Code as defined in RSA 77-A:1, XX.

XII. In the case of a business organization which makes qualified charitable contributions as defined in RSA 77-A:1, IX, or qualified research contributions as defined in RSA 77-A:1, X, the gross business profits of the organization shall be adjusted by:

(a) Adding to gross business profits the amount deducted under section 170 of the United States Internal Revenue Code as defined in RSA 77-A:1, XX in arriving at federal taxable income; and

(b) Deducting from gross business profits an amount equal to the sum of the taxpayer's basis in the contributed property plus 50 percent of the unrealized appreciation, or twice the basis of the property, whichever is less.

XIII. A deduction for the amount of the net operating loss carryover determined under section 172 of the United States Internal Revenue Code as defined in RSA 77-A:1, XX; provided, however, that in calculating such net operating loss carryover, the election permitted under section 172(b)(3)(C) of the United States Internal Revenue Code as defined in RSA 77-A:1, XX shall not be allowed. A net operating loss shall be apportioned in the year incurred according to RSA 77-A:3 and such apportioned net operating loss may only be carried forward for the 5 years following the loss year. The amount of net operating loss generated in a tax year that may be carried forward may not exceed $250,000. In the case of a business organization not qualifying for treatment as a subchapter C corporation under the United States Internal Revenue Code, such deduction shall be the amount that would be determined under section 172 of the United States Internal Revenue Code as defined in RSA 77-A:1, XX if the business organization were a subchapter C corporation and as limited by this section. A deduction for the amount of the net operating loss carryover

shall be limited to losses incurred on or after January 1, 1989.

XIV. In the case of a business organization where an interest or beneficial interest in the organization has been sold or exchanged, an addition to gross business profits of an amount equal to the net increase in the basis of all underlying assets transferred or sold through the sale or exchange of the interest. The increase in the basis of the assets shall be determined in accordance with the provisions of the Internal Revenue Code as defined by RSA 77-A:1, XX.

77-A:5 Credits. The following credits are allowed against the tax due under this chapter:

I. Taxes paid pursuant to RSA 83-C, and taxes paid pursuant to RSA 83-B covering the period from January 1, 1983, through June 30, 1983;

II. Taxes paid pursuant to RSA 84, Taxation of Banks;

III. Taxes paid pursuant to sections of RSA 400-A relating to taxation of insurance companies;

IV. [Repealed.]

V. The investment tax credit as computed in RSA 162-L:10.

Provided, that the total amount of any such credit allowed shall not exceed the tax due under this chapter.

77-A:6 Returns, Declarations, and Combined Reporting.

I. Every business organization having gross business income in excess of $12,000 as defined by RSA 77-A:1, VI, during the taxable period, shall on or before the fifteenth day of the third month in the case of organizations required to file a United States corporation tax return, and the fifteenth day of the fourth month in the case of all other business organizations, following expiration of its taxable period, make a

return to the commissioner. The commissioner of revenue administration shall adopt rules, pursuant to RSA 541-A, relative to the form of such return and the data which it must contain for the correct computation of taxable business profits and gross business income attributable to this state and the tax assessed on it. All returns shall be signed by the taxpayer or by its authorized representative, subject to the pains and penalties of perjury.

II. Every business organization shall in addition file a declaration of its estimated business profits tax for its subsequent taxable period; provided, however, if the estimated tax is less than $200, a declaration need not be filed; and provided further that a declaration shall be filed at the end of any quarter thereafter in which estimated tax exceeds $200. The declaration shall be filed when payments are due under RSA 77-A:7.

III. Any return or declaration shall be deemed to be timely filed and the payment due with it timely made if received in the office of the department of revenue administration on or before the last day of the month in which the original statutory due date or approved extended due date falls.

IV. A business organization which is part of a water's edge combined group and required to report under this chapter shall file a return containing the combined net income of the water's edge combined group and such other informational returns as the commissioner shall require by rules adopted under RSA 541-A. The commissioner is authorized to impose the tax as though the entire combined net income of the water's edge combined group was that of one business organization or he may adjust the tax or income in such other manner as he shall determine to be equitable if he determines it to be necessary in order to clearly reflect the net income earned by such organization from business done in this state. This provision shall not authorize the application of worldwide combined reporting except as provided in RSA 77-A:2-b, II.

77-A:7 Payments Due With Returns and With Estimates.

I. All business organizations required under RSA 77-A:6, II to make payments of estimated tax shall make such payments in installments as follows: 30 percent is due and payable on the fifteenth day of the fourth month of the subsequent taxable year; 30 percent is due and payable on the fifteenth day of the sixth month of the subsequent taxable year; 20 percent is due and payable on the fifteenth day of the ninth month of the subsequent taxable year; and 20 percent is due and payable on the fifteenth day of the twelfth month of the subsequent taxable year.

If the return required by RSA 77-A:6, I, shows an additional amount to be due, such additional amount is due and payable at the time the return is filed. If such return shows an overpayment of the tax due, the commissioner shall refund such overpayment to the taxpayer or shall allow the taxpayer a credit against a subsequent payment or payments due, to the extent of the overpayment, at the taxpayer's option.

II. [Repealed.]

77-A:7-a Interest. Any business organization which fails to make payment with a return when due shall pay interest as prescribed in RSA 21-J:28.

77-A:8 Additional Returns. When the commissioner has reason to believe that a taxpayer has failed to file a return or to include any part of its gross business profits in a filed return, the commissioner may require the taxpayer to file a return or a supplementary return showing such additional information as the commissioner prescribes. Upon the receipt of the supplementary return, or if none is received within the time set by the commissioner, the commissioner may find and assess the amount due upon the information that is available. The making of such additional return does not relieve the taxpayer of any penalty for failure to make a correct original return or relieve it from liability for interest imposed under

RSA 77-A:7-a or any other additional charges imposed by the commissioner.

77-A:9 Extension of Time for Returns. For good cause, the commissioner may extend the time within which a taxpayer is required to file a return, and if such return is filed during the period of extension no penalty or late payment charge may be imposed for failure to file the return at the time required by this chapter, but the taxpayer shall be liable for interest as prescribed in RSA 21-J:28.

77-A:10 Corrections. Each taxpayer shall report to the commissioner of revenue administration any change in the amount of its gross business profits as finally determined by the United States Internal Revenue Service with respect to any previous year for which the taxpayer has made a return under this chapter. Such a report shall be made not later than the due date of the next annual return after the taxpayer has received notice that such change has finally been determined.

77-A:11 Taxpayer Records. Every business organization shall:

I. Keep such records as may be necessary to determine the amount of its liability under this chapter;

II. Preserve such records for the period of 3 years or until any litigation or prosecution hereunder is finally determined;

III. Make such records available for inspection by the commissioner or his authorized agents, upon demand, at reasonable times during regular business hours. Whoever violates the provisions of this section shall be guilty of a misdemeanor if a natural person, or guilty of a felony if any other person.

77-A:12 Failure to Make Returns; False Returns or Records. The following acts or omissions are unlawful:

I. Failing to make any return or declaration required by this chapter;

II. Making, causing to be made or permitting to be made any false or fraudulent return or declaration or false statement in any return or declaration, with intent to defraud the state or to evade payment of the tax or any part of the tax imposed by this chapter;

III. Making, causing to be made or permitting to be made any false entry in books, records or accounts with intent to defraud the state or to evade the payment of the tax or any part of the tax imposed by RSA 77-A or keeping, causing to be kept or permitting to be kept more than one set of books, records or accounts with such intent. Whoever violates the provisions of RSA 77-A:12 shall be guilty of a misdemeanor if a natural person, or guilty of a felony if any other person.

77-A:13 Adjustments; Procedure. The commissioner is empowered to determine whether there has been error in the assessment of the tax imposed by this chapter, in accordance with the following provisions:

I. The taxpayer may demand such a determination, in writing within 3 years after the tax was due;

II. The commissioner may, on his own motion, undertake such a determination upon written notice to the taxpayer given within 3 years after the tax was due or paid, whichever is later, except that where the taxpayer has reported a correction pursuant to RSA 77-A:10, such notice must be given within 6 months of the report;

III. After hearing, if requested by the taxpayer, the commissioner shall affirm or shall increase or decrease the tax theretofore assessed. Any increase ordered by the commissioner shall be assessed against the taxpayer and shall carry interest as prescribed in RSA 21-J:28. Any decrease ordered by the commissioner shall, with interest pursuant to RSA

21-J:28 from the date the tax was paid, be credited against any unpaid tax then due from the taxpayer; and any balance due the taxpayer shall be certified to the state treasurer who shall pay the balance to the taxpayer. Such credit and payment together may not exceed the amount of the tax originally paid.

77-A:14 Appeal. Within 30 days after notice of any adjustment of tax by the commissioner under RSA 77-A:13, a taxpayer may appeal the commissioner's determination either by written application to the board of tax and land appeals or by petition to the superior court in the county in which the taxpayer resides or, if not a resident of the state, in the county in which it was a place of business or resident agent. The board of tax and land appeals or the superior court, as the case may be, shall determine de novo the correctness of the commissioner's action.

77-A:15 Administration.

I. The commissioner shall collect the taxes, interest, additions to tax and penalties imposed under this chapter. The commissioner shall determine the expense of administration of this chapter and shall certify and pay over to the state treasurer the amount of remaining balance of the funds collected under this chapter after the expenses of administration have been deducted.

II. The commissioner of revenue administration shall adopt rules, pursuant to RSA 541-A, relative to:

(a) The administration of the business profits tax; and

(b) The recovery of any tax, interest on tax, or penalties imposed by RSA 77-A.

III. The commissioner may institute actions in the name of the state to recover any tax, interest on tax, additions to tax or the penalties imposed by this chapter.

IV. In the collection of the tax imposed by this chapter, the commissioner may use all of the powers granted to tax collectors under RSA 80 for the collection of taxes, except that the tax imposed by this chapter shall not take precedence over prior recorded mortgages. The commissioner shall also have all of the duties imposed upon the tax collectors by RSA 80 that are applicable to him. The provisions of RSA 80:26 apply to the sale of land for the payment of taxes due under this chapter, and the state treasurer is authorized to purchase the land for the state. If the state purchases the land, the state treasurer shall certify the purchase to the governor, and the governor shall draw his warrant for the purchase price out of any money in the treasury not otherwise appropriated.

V. The commissioner may take the oath of any person in the course of any hearing authorized under RSA 77-A:13. In connection with hearings, the commissioner and taxpayer have the power to compel attendance of witnesses and the production of books, records, papers, vouchers, accounts or other documents. The commissioner and taxpayer may take the depositions of witnesses residing within or without the state pertaining to any matter under this chapter, in the same way as depositions of witnesses are taken in civil actions in the superior court. Fees of witnesses are the same as those allowed to witnesses in the superior court and in the case of witnesses summoned by the commissioner shall be considered as an expense of administration of this chapter.

VI. Any notice required by this chapter to be given by the commissioner to a taxpayer shall be made by first class mail to the last known address of the taxpayer, but in the case of hearings, notice shall be given at least 10 days before the date of the hearing and by certified mail.

77-A:16 Confidentiality of Department of Revenue Administration Records.

[Repealed 1977, 203:2, eff. Aug. 13, 1977.]

77-A:17 Preference. The taxes and interest imposed by this chapter have preference in any distribution of the assets of the taxpayer, whether in insolvency or otherwise.

77-A:18 Certifications for Dissolution, Withdrawal and Good Standing.

I. (a) No corporation organized under any law of this state may be dissolved until all taxes and interest imposed upon the corporation under this chapter have been fully paid. The secretary of state shall not issue a certificate of dissolution, and no decree of dissolution shall be signed in any court without a statement from the commissioner of revenue administration that no returns, tax, interest, or penalties for taxes administered by the department are due and unpaid.

(b) A corporation wishing to dissolve shall submit a written request containing the complete corporate name and identification number and accompanied by a non-refundable fee of $30 to the commissioner of revenue administration. This fee shall be deposited into the general fund. If, after reviewing the corporation's records, the commissioner determines that no returns, tax, interest, or penalties for taxes administered by the department are due and unpaid, the commissioner shall prepare a statement in accordance with subparagraph (a).

II. A business organization wishing to obtain a statement for withdrawal, in accordance with RSA 293-A:126, I(f), shall submit a written request containing the complete corporate name and identification number and accompanied by a non-refundable fee of $30 to the commissioner of revenue administration. This fee shall be deposited into the general fund. If, after reviewing the business organization's records, the commissioner determines that no returns, tax, interest or penalties for taxes administered by the department are due and unpaid, the commissioner shall prepare a statement for withdrawal for the purposes required under RSA 293-A:126, I(f).

III. A business organization wishing to obtain a state-

ment that it is in good standing with the department of revenue administration shall submit a written request containing the complete corporate name and identification number and accompanied by a non-refundable fee of $30 to the commissioner of revenue administration. This fee shall be deposited into the general fund. If, after reviewing the business organization's records, the commissioner determines that no returns, tax, interest or penalties for taxes administered by the department are due and unpaid, the commissioner shall prepare a statement of good standing.

77-A:19 Lien for Tax. No lien upon real estate for taxes imposed by this chapter is valid and binding against any person other than the taxpayer until notice of such lien stating the name and address of the taxpayer and the amount of the tax due shall have been filed and recorded in the registry of deeds in the grantor index in the county in which such real estate is located. Not withstanding the provisions of any other law, the lien shall continue and shall be valid and binding until the liability for the sum, with interest and costs, is satisfied or becomes unenforceable.

77-A:20 Distribution of Increase in Revenue.

[Repealed 1981, 568:122, III, eff. July 1, 1984.]

77-A:21 Severability. If any provision of this chapter or the application thereof to any person or circumstance is held to be invalid, the invalidity shall not affect any other provision or the application of such provision to other persons or circumstances, and to this end the provisions of this chapter are severable.

New Hampshire Revised Statutes Annotated § 107-B:1 through 107-B:6

CHAPTER 107-B

NUCLEAR PLANNING AND RESPONSE PROGRAM

107-B:1 Nuclear Emergency Response Plan.

I. The director of emergency management shall, in cooperation with affected local units of government, initiate and carry out a nuclear emergency response plan as specified in the licensing regulations of each nuclear electrical generating plant. The chairman of the public utilities commission shall assess a fee from the utility, as necessary, to pay for the cost of preparing the plan and providing equipment and materials to implement it.

II. The director of emergency management shall conduct an annual review of the nuclear emergency response plans for those municipalities located in the emergency planning zone, as defined in Nuclear Regulatory Commission regulation Title 10, Code of Federal Regulations, Part 50.

107-B:2 Annual Emergency Response Budget. The municipalities shall submit annually their emergency response budget to the director of emergency management who shall provide a reasonable opportunity for public comment and consideration. The director shall also receive and review the appropriateness of any budget request from any other state agency necessary for radiological emergency preparedness as outlined in the plan. The director shall then submit an approved total annual budget to the chairman of the public utilities commission for assessment against the utility or utilities.

107-B:3 Assessment.

I. The cost of preparing, maintaining, and operating the nuclear planning and response program shall be assessed against each utility which has applied for a license to operate or is licensed to operate a nuclear generating facility which affects municipalities under RSA 107-B:1, II, in such proportions as the chairman of the public utilities commission determines to be fair and equitable.

II. Assessments under this section shall not be charged to the normal operating costs of any company before the issuance of an operating license.

107-B:4 Collection of Assessment. The chairman of the public utilities commission shall certify to the state treasurer the amount to be assessed against each utility, and the state treasurer shall bill each utility for the amount assessed against it. The bill shall be sent by registered mail, and shall constitute notice of assessment and demand for payment. Payment shall be made to the state treasurer within 30 days after the receipt of the bill. If any utility shall fail or refuse to pay the assessed fee within 30 days, the chairman shall add to the fee a late penalty fee and certify the amount of the delinquent fee and penalty to the attorney general for collection.

107-B:5 Fund Established. All funds collected under this chapter shall be deposited in the state treasury as "restricted revenues." The full amount shall be credited to the New Hampshire nuclear planning and response fund and shall be used exclusively for the New Hampshire nuclear planning and response program.

107-B:6 Authority in Radiological Emergency. In the event of a radiological emergency at a nuclear electric generating facility where the responsible utility is unable to control the situation as necessary to protect public health and safety, the governor shall regulate the utility under RSA 107:6.

New Hampshire Revised Statutes § 162-F:14 through 162-F:26

Decommissioning of Nuclear Electric Generating Facilities

162-F:14 Definitions. As used in this subdivision:

I. "Committee" means a nuclear decommissioning financing committee established pursuant to RSA 162-F:15.

II. "Decommissioning of a nuclear electric generating facility" means, but is not limited to, any or all of the following as may be required by any federal or state agency with jurisdiction when any radioactive portion of the facility is permanently removed from service:

(a) Removal, relocation, shipment, containment, demolition, dismantling or storage or a combination thereof of any radioactive equipment, materials, nuclear wastes or contaminated structures and future and present storage of radioactive debris.

(b) Restoration and rehabilitation of the physical and aesthetic appearance of the decommissioning site.

III. "Facility" means any nuclear electric generating facility subject to decommissioning pursuant to this subdivision.

IV. "Fund" means a nuclear decommissioning financing fund established pursuant to RSA 162-F:19.

V. "Lead company" means the utility designated by the owner or owners of the facility.

162-F:15 Committee Established.

I. A nuclear decommissioning financing committee shall be established for each nuclear electric generating facility which is required to be approved under this chapter.

II. Each committee shall consist of one person who is a resident of the town or city in which the facility is to be located and who shall be appointed by the selectmen of the town or the mayor and council of the city, the chairman of the public utilities commission, the chairman and the vice-chairman of the legislative fiscal committee, the state treasurer or his designee, the commissioner of the department of health and human services or his designee, the commissioner of the department of safety or his designee, and a representative

of the lead company as designated by the owner or owners of the facility.

III. The person appointed by the selectmen of the town or the mayor and council of the city shall serve a 3-year term and any vacancy shall be filled for the unexpired term in the same manner as the original appointment. In the event that more than one facility is licensed to be built in the state, the committee as designated in RSA 162-F:15, II shall serve in the same capacity, except that the appointed member who is a resident of the city or town shall be selected in the manner prescribed by this section.

162-F:16 Overlapping Jurisdictions. If a facility is located in more than one city or town, for the purpose of selecting a nuclear decommissioning financing committee, it shall be deemed to be located in the city or town in which the largest part of the main nuclear reactor building is located.

162-F:17 Organization of Committees.

I. The temporary chairman, who shall be the chairman of the public utilities commission, shall call an organizational meeting within 90 days of May 4, 1981. At the organizational meeting, the committee shall select a chairman to serve for a 3-year term, elect such other officers as the members shall determine, and establish a schedule of meetings for determining the requirements of the decommissioning fund. The committee shall determine the requirements for the fund and shall prepare a payment schedule under RSA 162-F:19 on or before October 1, 1982.

II. In the event that additional nuclear electric generating facilities receive certificates of site and facility, each committee shall organize within one year of the receipt of such certificate.

III. After the requirements for the funds have been established, the committees shall meet at least once a year and,

for good cause, the committees may increase or decrease the amount of the funds pursuant to RSA 162-F:22, I, or may alter the funding schedules because of changed circumstances delineated in RSA 162-F:22, II. Each committee may hire such temporary help as it deems necessary to carry out its duties under this subdivision. The appointed resident member of each committee is authorized $40 for each day actually engaged in the duties of the committee.

162-F:18 Expenses of Committee. The reasonable expenses of each committee, including clerical and technical assistance, shall after approval by the public utilities commission be a charge against the owner or owners of the facility.

162-F:19 Decommissioning Fund Established.

I. A separate nuclear decommissioning financing fund shall be established in the office of the state treasurer for each nuclear electric generating facility in the state. The monies in such fund shall not be subject to any federal or state taxes and shall not provide any monetary profit to the owner or owners of the facility.

II. The committee shall establish a regular monthly schedule for payment of monies into the fund by the owner or owners of the facility. The monthly payment shall not be less than necessary to reach the specified amount needed for decommissioning as determined by the committee. The Collection of money and payment to the fund shall commence in the billing month which reflects the first full month of service from the facility.

III. The public utilities commission shall permit the utility to charge its customers on a per kilowatt hour basis the amount it pays directly into the fund created under this section. The charge, as determined by the public utilities commission, shall be designated a nuclear decommissioning charge and shall be separately stated on the customer's billing statement.

162-F:20 Administration of Fund.

I. The state treasurer shall administer each fund established under this subdivision. The treasurer and the committee shall take every reasonable precaution to preserve the integrity of each non-taxable fund. Interest, dividends and other earnings of the fund shall, after deducting the expenses of administering the fund, be added to the fund and shall be considered payments to the fund until the specified amount is reached.

II. Upon completion of decommissioning, any earnings of the fund in excess of the specified amount, after deducting the reasonable expenses of administration, shall be returned to the owner or owners required to make deposits in such fund and shall cause an adjustment of the rates paid by the utility's customers. The committee, upon completion of decommissioning of the facility, shall forward a report to the public utilities commission relative to the status of the account and the surplus to be derived by the owner or owners of the facility. Based on the committee's report and any other information the public utilities commission may request, the commission shall determine an equitable method for a reduction in the rates charged to the utility's customers to compensate for the overpayment to the fund.

162-F:21 Funding Requirements Established; Report; Public Hearing.

I. Each committee shall hold at least one public hearing to receive information on funding requirements for each fund. The committee shall have the authority to subpoena witnesses and administer oaths and to compel by subpoena duces tecum the production of any accounts, books, contracts, records, documents, memoranda and papers in order to determine the amount needed for the fund.

II. The amount of the fund shall be sufficient to cover all costs of decommissioning the facility when carried out by

methods which have been proven to be workable and capable of achieving and maintaining the level of decommissioning required by the United States Nuclear Regulatory Commission or its successor organization, or standards set by any state agency with jurisdiction over decommissioning which are not less than those levels set by the United States Nuclear Regulatory Commission.

III. Each committee shall rely on all available data and experience in determining the amount of such fund including, but not limited to, information from the United States Nuclear Regulatory Commission or its successor organization; the public utilities commission; the owner or owners of the facility; counsel for the public appointed under RSA 162-F:9; counsel for the legislative utility consumers council; and relevant construction cost indices. The committee shall publish a transcript of all proceedings during which information was presented or offered into testimony and a detailed analysis of the facts and figures used in determining the amount of the fund.

IV. Following the committee's deliberation and prior to final hearing, the plan for scheduled payments into the fund and relevant evidence, including the transcripts and analysis published pursuant to RSA 162-F:21, III, shall be available for public review in the clerk's office of the city or town where the facility is located and in the office of the public utilities commission at least 30 days prior to the one or more public hearings on the committee's proposed plan. At least one hearing shall be held in the city or town where the facility is located. A notice of the time and place of each hearing shall be posted in 2 appropriate public places in the city or town where the facility is located and shall be printed at least twice in a newspaper of general circulation for that city or town and in a newspaper of state-wide circulation 2 weeks prior to each hearing. Testimony presented at the hearings held pursuant to this paragraph shall be taken into consideration by the committee when they formalize the payment schedule plan. All testimony shall be transcribed and made a permanent record.

162-F:22 Changes in Funding Requirements.

I. At any time during the energy-producing life of the facility the committee may determine whether the amount of the funds shall be increased or decreased for reasons including, but not limited to, changes in circumstances, need, or technological advances. Prior to altering the amount of the fund, the committee shall hold at least one public hearing in the city or town where the facility is located. All testimony shall be transcribed and made a permanent record.

II. (a) If during the anticipated energy-producing life of the facility:

(1) A state or federal agency with jurisdiction orders the facility to be decommissioned any charges included on utility customers' billing statements pursuant to RSA 162-F:19, III shall be discontinued within 30 days after the decommissioning order is issued;

(2) The owner or owners voluntarily close the facility for more than 6 months other than for scheduled or unscheduled repairs, any charges included on utility customers' billing statements pursuant to RSA 162-F:19, III shall be discontinued within 30 days after the end of the 6-month closing;

(3) The public utilities commission ascertains the facility is no longer generating electrical energy and that decommissioning of the facility should be commenced because of such non-use, any charges included on utility customers' billing statements pursuant to RSA 162-F:19, III shall be discontinued within 30 days after the commission's determination is made.

(b) Upon the discontinuation of customer billing for the fund, the committee shall institute a revised schedule for funding requirements to cover the expenditures of the decommissioning. The revised funding schedule may include, but not be limited to, a resumption of customer charges authorized

pursuant to RSA 162-F:19, III, payments made by the owner or owners separate from customer charges, and available revenue sources from the federal and state governments. The committee shall hold at least one public hearing relative to establishing the revised funding schedule consistent with the public hearing requirements delineated in RSA 162-F:21. All testimony shall be transcribed and made a permanent record. Any funding schedule which includes the assessment of charges to utility customers shall be reviewed and approved by the public utilities commission pursuant to RSA 162-F:19, III.

162-F:23 Use of Fund. The fund shall remain intact until the beginning of a facility's decommissioning. The committee shall review all expenditures from such fund during actual decommissioning to properly maintain the fund's tax-exempt status. The unused portion of the fund shall revert to the owner or owners at the completion of decommissioning pursuant to RSA 162-F:20, II. If perpetual, continual surveillance of a facility is necessary, the fund shall be maintained at a level sufficient to yield income to maintain such surveillance.

162-F:24 Enforcement. The superior court may enjoin any act in violation of a determination of a nuclear decommissioning financing committee, or it may require the owner or owners to comply with any determination or order of such committee. Failure by an owner to make the payments required by this subdivision shall create a debt owing to the state which may be collected by the attorney general in an action at law. If any owner fails to pay any judgment ordered by a court of competent jurisdiction, the attorney general may levy against the property of such owner to satisfy such judgment.

162-F:25 Penalty. Any person who wilfully violates any order or determination of a committee shall be guilty of a misdemeanor if a natural person, or guilty of a felony if any other person.

162-F:26 Appeal. Any person who is aggrieved by an

order or a decision of a nuclear decommissioning financing committee may appeal under RSA 541.

Excerpts from Decision of Connecticut Department of Public Utility Control in Application of Connecticut Light and Power Company Docket No. 90-12-03, August 1, 1991.

F. Expenses and Expense Adjustments

Based on its review, of the Company's testimony and exhibits, coupled with a field audit of its books and records, the Authority finds that the pro forma operating expenses claimed are allowed except as discussed below.

1. Merger Synergies

The Company's pro forma operating expenses include an adjustment to reflect the savings (synergies) and costs associated with the acquisition of Public Service Company of New Hampshire ("PSNH"). The Company indicates that the combination and subsequent joint operation of the existing NU and the PSNH systems are expected to produce significant cost reductions when compared to the operation of the systems separately. (Roman PFT, p. 21) The adjustment on Revised Schedule C-3.38, which reflects an effective merger date of 9/1/91, identifies several areas in which ratepayers will benefit:

a) a reduction in operation and maintenance expenses resulting from North Atlantic Energy Corporation's operation of Seabrook No. 1.

b) a reduction in the energy expenses of the combined NU/PSNH system because of the more efficient own-load dispatch of its generating units, and

c) a reduction in CL&P's administrative and general

(A&G) expenses due to the combining of many functions now performed separately by PSNH and NU.

In Docket No. 90-01-01, *DPUC Investigation of Northeast Utilities Plan to Acquire Public Service Company of New Hampshire*, CL&P described and addressed these benefits. In subsequent proceedings before the New Hampshire Public Utilities Commission and the Federal Energy Regulatory Commission ("FERC"), the amount of the benefits was revised. The amounts included in Revised Schedule C-3.38 reflect the updated synergies. Also included in Revised Schedule C-3.38 is CL&P's share of the costs of accomplishing the acquisition. These costs represent CL&P's allocated portion of the charges associated with the Department and FERC proceedings related to the merger.

The Company provided data that indicate that the magnitude of PSNH related services in the rate year will grow and are projected into perpetuity to total $225 million in cumulative net present value. (Response to Interrogatory EL-282 Supp., p. 5) Data were provided that show that the Company's rate request would increase by $15,332,000 if the NU/PSNH merger did not go forward. (Late Filed Exhibit No. 2-133) Authority analysis of the various synergies indicates that joint dispatch savings account for the major portion. These savings are derived based on the comparison of the combined system own load simulation with that of NU and PSNH, at 4/1/91 fuel prices. The Company's updated projections reflect a substantial decrease in the joint dispatch savings caused by a drop in fossil fuel prices.

In developing NU's share of the Joint Dispatch Savings, the benefits were allocated fifty percent between PSNH and NU, as described in the PSNH Sharing Agreement. If the NUG&T agreement were used, 65 percent of the savings would accrue to NU. The Company indicated that it would not be appropriate to apply the NUG&T Agreement in deriving NU's share of the joint dispatch savings because the Authority is bound by the Sharing Agreement, which is part of the FERC

approval Agreements. (TR 5/1/91, p. 45; Brief p. 83)

The Authority is not bound by the Sharing Agreement. The Department has made no determination regarding the proposed merger, and will not prior to the issuance of the Decision in the merger docket. The Company has chosen to include certain savings from the proposed merger and must bear the risk of uncertainty. Synergy savings of 50% could be as elusive as savings of 65%. The Authority will allow the 50% allocation for purposes of this Decision, but advises the Company that the allowance is in no way dispositive of the issue. The Department will revisit it in Docket No. 90-01-01, when it considers all aspects of the proposed merger, including this issue.

2. PSNH Acquisition Costs

The Company seeks reimbursement from Connecticut ratepayers for the cost it has incurred at the Federal Energy Regulatory Commission and the proceeding before this Department to acquire the bankrupt Public Service Company of New Hampshire.

Because the acquisition is pending and unresolved at the current time and because this Company is regulated in large part on a forward looking basis, some assumptions had to be made regarding the proposed acquisition. The Company selected and assumed for purposes of its presentation that the acquisition would obtain the necessary approvals and become effective during September 1991. The expectations flowing from this assumption are contained in sundry adjustments throughout the case.

When this case started, the projected "benefits" to Connecticut ratepayers of the takeover were over 20 million dollars. During the pendency of this case, those benefits had declined by almost two-thirds. CL&P asserts that because ratepayers can still anticipate some benefits they should pay the acquisition costs.

The proposition that the Authority should equate possible benefits flowing from the proposed merger with acquisition costs is wrong. Possible acquisition benefits must be evaluated against possible acquisition risks. In the instant case, only the benefit side of the equation was explored in depth and as we have seen and already noted, these benefits are transient and volatile. The equitable risks associated with the acquisition will be fully explored in Docket No. 90-01-01. Indeed, the Company's own witness indicated that the post acquisition capital structure of the NU holding company will be very highly leveraged; therefore, at least for a period of time, more risky because of the merger. Whether or not possible benefits outweigh possible risks will be decided in that docket. The only question we need resolve here is the allocation of the aforementioned acquisition cost. This is separate and distinct from benefits and risks and must be evaluated independently.

We resolve it by not permitting one penny of these costs to be charged to Connecticut ratepayers. To assert that CL&P ratepayers should pay the acquisition costs incurred in bailing PSNH out of bankruptcy is an affront. The white knight is being charged for the privilege of rescuing the damsel; the lifeguard is billed for saving the floundering swimmer.* We reduce pro forma expense by $7,684,000.

In its written exceptions, the Company again claims that it is entitled to recover $2,813,000 associated with the Department's investigation of this merger in Docket No. 90-01-01. To that claim we again respond ". . . not . . . one penny of these costs (will be) charged to Connecticut ratepayers."

*The suggestion that Connecticut ratepayers pay for the privilege of assisting New Hampshire is made even more irksome by the enactment of New Hampshire public law, HB-FN-A, codified at Chapter 83-D of New Hampshire Revised Statutes Annotated, wherein New Hampshire has enacted a lasso tax whose loop only captures out of state Seabrook Station owners. This tax, if not overturned, would cost Connecticut ratepayers almost 5 million dollars per annum.

Let us get a couple of things straight. We did not order the Company or Northeast Utilities to engage in a bidding war before the Bankruptcy Court to acquire this moribund utility. This it did on its own initiative. The joinder of Public Service of New Hampshire into Northeast Utilities has profound implications for CL&P. Is the Company seriously suggesting that Connecticut regulators ignore this matter? To contend that because we did our duty Connecticut ratepayers should be charged is an affront. The Company with scolding tone notes that we engage Booz-Allen & Hamilton, Inc. to assist in our analyzing NU's undertaking and that the bills have been large. Who should we have hired, Roto-Rooter? This is an exceedingly complex, multi-faceted proposition. We engaged competent assistance. We have scrupulously overseen both the level of effort and expense to assure that no more than is necessary is expended. But, none of these efforts and none of these expenditures would have been necessary but for the unsolicited, gratuitous actions of NU.

There is nothing in § 16-8 of the Conn. Gen. Stat. that requires us to allow the Company to charge ratepayers for these expenses. The statute contemplates recovery only when this Department determines that such costs are reasonable and proper for recovery, as business expenses of the Company. Under the aforenoted circumstances and in view of the fact that this activity is not part of the ordinary course of CL&P's business, this is a finding we cannot and will not make.

Excerpts from New Hampshire House of Representatives Floor Debate Re: House Bill 64, April 2, 1991.

MR. SPEAKER: The Chair recognizes the member from Concord, Representative Hayes, to speak to the Hayes floor amendment.

MR. HAYES: Thank you, Mr. Speaker. I rise in support of the new Committee amendment. I'd be less than frank if I didn't say this is one of the most complex taxes I've seen

in my time in State government, but the broad outlines are understandable, and they've been covered to some extent by previous speakers. This amendment, which is the bill, eliminates the current electric franchise tax. Thus, as has been said, if you're served by (Inaudible), Granite State, the Co-op, Connecticut Valley, you will see a rate decrease. In addition, Public Service will not be paying a one per cent retail tax on the service it provides. The constitutional issues were talked about by the Majority Leader. The federal constitutional issues we believe we have avoided by going to a property tax by not using credits against the retail tax as was done in the New Mexico case and by not having a match. The State constitutional question is unchanged from previous, and we believe that the prior court opinions justify this classification. The third issue is the business profits tax credit, which is very similar to the credit the utilities enjoyed under the franchise tax. Essentially, we're exchanging a somewhat uncertain business profits tax for a more certain tax up front. This is done in a number of different taxes. Finally, the property tax itself. It is at a rate of 0.64 per cent upon the nuclear plant itself. It raises 22.4 million dollars per year in the first year, which is a net increase of 14 million dollars over what we would have received from the franchise taxes at the present time. Sixty-five per cent of this tax will be paid by out-of-state interests. If you do the math to work this out, you'll see that over 14 million dollars is paid by out-of-state interests; and you can conclude that they are indeed are financing this increase in the utility taxes that we're going to pay. Over the seven-year term of the rate agreement, I am assured by those who know that this will have no increase or negligible increase in rates, that you will not be able to see this in the negotiated five and a half per cent rate increase which this House has approved. Turning now to a few final issues, the courts have clearly said in their decisions that it is legal for both the State and the local government to impose an (Inaudible) property tax on the same property at the same time. So there is no problem with town taxes. I would point out that this 14 million dollar increase is an essential part of the budget package which was explained to you earlier today. You can look at your white sheet and tell

what it's going to fund. I would say that this is a tax in the New Hampshire tradition of finding some way for the other fellow to pay. This is a tax package that I believe has broad consensus. This is a tax package which will not be vetoed. This is a tax package which deserves your support, and I urge you to vote yes. Thank you, Mr. Speaker.

MR. SPEAKER: Member yield to a question. Member yields. Representative Brown, you may inquire.

MR. BROWN: Thank you, Mr. Speaker. Representative Hayes, are you telling this body, for the record, that this bill will have no affect on the Town of Seabrook's tax rate whatsoever, and that's going to be the legislative intent, is that correct?

MR. HAYES: Your question, as I understood it, was this bill will have no affect on the Town of Seabrook taxes, and I can assure you that this bill will not, for the record.

MR. SPEAKER: Are there further questions? Member yields. You may inquire.

MALE VOICE: Thank you, Mr. Chairman. Representative Hayes, did I understand correctly when you stated that there would be no increase or very little increase in the ratepayer's bills, was that correct?

MR. HAYES: I believe that's what I said and I believe that to be the case. I've been assured that this –
(Off the record.)

MR. HAYES: – change the negotiated rate agreement for Public Service. It will have a change if you're served by Granite State, by Unitel or Connecticut Valley, and that it will decrease your rates.

MALE VOICE: Further question.

MR. SPEAKER: Member yields. You may further inquire.

MALE VOICE: Did you also state that 65 per cent of these were out-of-state that would be paying this 14 million, or would it be the total plant that would be assessed for this?

MR. HAYES: The way the bill is written, which you have in your calendar, I believe, says that each owner is responsible for their share, so that as their share changes, they will in fact change what they owe. Your first part of the question, I believe was, is 65 per cent correct. Sixty-five per cent is the ownership interest other than Public Service. The number of out-of-state owners is actually 10 out of the 12, I believe. So you can draw your percentages where you wish.

MALE VOICE: Further question.

MR. SPEAKER: Member yield to further question? Member yields. You may inquire.

MALE VOICE: What's going to happen when Northeast Utilities takes over Public Service's share of the nuclear plant? That's going to be pretty near – when they get through, they'll have pretty near 50 per cent, won't they, and they're an out-of-state utility.

MR. HAYES: The owner, as I understand it, after the merger will be North Atlantic Energy Company, who will be the owner and operator, I guess, of the plant. It is true that Northeast Utilities has a subsidiary which owns a small share of the plant. That subsidiary is the Connecticut Light and Power Company. It owns 4.05985 per cent. So that together, if you wish to add those up, you will find that that is less than 40 per cent. However, neither N.U. directly owns either share is both indirectly, because they are the parent.

MALE VOICE: Further question.

MR. SPEAKER: Member yields. You may further inquire.

MALE VOICE: Did you ever see a tax that was placed on someone that wasn't collected from the consumer?

MR. HAYES: I would be willing to state that if a business does not pass a tax through to a consumer, then it's going out of business, sir. However, in this case we have taken a three tier tax system involving the property tax, the franchise tax and the business profits tax with complex inter-relations between the three and we've done the impossible. We don't believe this is going to show up in the rate base.

EXHIBIT A
1991 New Hampshire Laws Chapter 354

CHAPTER 354 (HB 64)

AN ACT RELATIVE TO THE BUSINESS PROFITS TAX, THE REAL ESTATE TRANSFER TAX, THE COMMUNICATION SERVICES TAX, RELATIVE TO ESTABLISHING A TAX ON NUCLEAR STATION PROPERTY AND MAKING AN APPROPRIATION THEREFOR, AND APPROPRIATING FUNDS FOR A TAX EXPENDITURE REPORT.

Be it Enacted by the Senate and House of Representatives in General Court convened:

354:1 **New Chapter; Tax on Nuclear Station Property.** Amend RSA by inserting after chapter 83-C the following new chapter:

CHAPTER 83-D

TAX ON NUCLEAR STATION PROPERTY

83-D:1 Declaration of Purpose and Findings. The general court finds:

I. Nuclear station property is the only property in the state that generates electricity from the fission of atoms.

II. Creating electricity from the fission of atoms imposes unique responsibilities on the state.

III. A nuclear station creates special and unique public safety requirements and burdens on the state.

IV. A nuclear station has a unique and long lasting impact on the environment which creates burdens on the state.

V. Accordingly, in the exercise of authority under part II, article 6 of the constitution of New Hampshire, the general court concludes that nuclear station property constitutes a distinct class of property that is appropriately subject to taxation as such by the state, to help defray the public charges of government, as provided in this chapter.

83-D:2 Nuclear Station Property Defined. For the purposes of this chapter, nuclear station property means the land, buildings, structures, tunnels, machinery, dynamos, apparatus, poles, wires, nuclear fuel and fixtures of all kinds and descriptions used in generating, producing, supplying and distributing electric power or light from the fission of atoms, exclusive of transmission lines.

83-D:3 Tax Imposed. A tax is imposed upon the value of nuclear station property at the rate of .64 percent of valuation, to be assessed annually as of April 1 and paid in accordance with this chapter.

83-D:4 Valuation. The commissioner of revenue administration shall determine the valuation of nuclear station property. For the purposes of this chapter, the commissioner shall appraise nuclear station property using the standard established pursuant to RSA 75:1.

83-D:5 Persons Liable. The tax imposed by this chapter shall be assessed upon each person with an ownership interest in nuclear station property, in the proportion that such person's ownership interest bears to the entirety of the ownership in the property.

83-D:6 Application of Credit. If the person liable for the tax imposed by this chapter is a member of a unitary business within the meaning of RSA 77-A:1, XIV, then the entire amount of the tax due under this chapter shall be allowed as a credit pursuant to RSA 77-A:5, VI, against the tax liability of such unitary business under RSA 77-A.

83-D:7 Returns and Declarations.

I. On or before January 15 each year, each person shall file with the commissioner of revenue administration, on a form prescribed by the commissioner, a return based on the valuation for April 1 of the prior year. The return shall be accompanied by the payment of such amount as has not been prepaid in accordance with paragraph III of this section. If the return shows an additional amount to be due, such additional amount is due and payable at the time the return is filed. If such return shows an overpayment of the tax due, a credit against a subsequent payment or payments due, to the extent of the overpayment, shall be allowed.

II. On or before April 15 of each year, each person liable to pay the tax imposed by this chapter shall file with the commissioner, on a form prescribed by the commissioner, a statement setting forth the amount of its ownership interest as of April 1. The statement shall include such additional information as the commissioner shall require and shall be signed by an authorized representative, subject to the pains and penalties of perjury. The statement shall be accompanied by the payment of such amount as has not been prepaid in accordance with paragraph III of this section.

III. At the time the statement required by paragraph II is filed, each person liable for the tax shall, in addition, file a declaration of the estimated tax to be assessed as of April 1 in the current calendar year, based on the tax assessed for the preceding calendar year, accompanied by payment of ¼ of the estimated tax due. Additional payments of ¼ of the estimated tax shall be made on June 15, September 15 and December 15.

IV. As of June 1 of each year the principal owner of a nuclear station shall file a list of the changes made to the nuclear station property since the prior April 1. This statement shall include such additional information as the commissioner shall require and shall be signed by an authorized

representative, subject to the pains and penalties of perjury.

V. Taxes and estimated taxes not paid when due shall be subject to appropriate penalties and interest under RSA 21-J.

83-D:8 Records.

I. Every person liable for tax under RSA 83-D:5 shall:

(a) Keep such records as may be necessary to determine the amount of his liability under this chapter.

(b) Preserve such records for the period of at least 3 years or until any litigation or prosecution under this chapter is finally determined.

(c) Make such records available for inspection by the commissioner of revenue administration or his authorized agents, upon demand, at reasonable times during regular business hours.

II. Whoever violates any of the provisions of this section shall be guilty of a misdemeanor if a natural person, or guilty of a felony if any other person.

83-D:9 Tax Payable for 1991. For the calendar year 1991, the tax imposed by this chapter shall be deemed to have been assessed as of April 1, 1991. For purposes of such assessment, the valuation of nuclear station property shall not exceed $3,500,000,000. No later than 30 days after the effective date of this chapter, each person liable for the tax shall file with the commissioner of revenue administration a statement setting forth the amount of the person's ownership interest and a list of the changes made to the nuclear station property since the prior April 1. Payments of estimated tax are due on September 15 and December 15, 1991. Liability for the tax payable for 1991 is limited to ½ of the amount that would otherwise be due. For purposes of this section, estimated tax

payments shall be based upon a valuation of nuclear station property equal to $3,500,000,000. Any overpayment or underpayment under RSA 83-D, by a person defined in RSA 83-D:5, shall be reconciled pursuant to RSA 83-D:7, I.

83-D:10 Adjustments; Procedure. The commissioner of revenue administration is empowered to determine whether there has been error in the assessment of the tax imposed by RSA 83-D:3 in accordance with the following provisions:

I. The person may demand such a determination in writing, within 30 days after the tax was due.

II. After hearing, if requested by the person, the commissioner shall affirm or shall increase or decrease the tax assessed. Any increase ordered by the commissioner shall be assessed against the person and shall carry interest as prescribed in RSA 21-J:28. Any decrease ordered by the commissioner shall, with interest pursuant to RSA 21-J:28 from the date the tax was paid, be credited against any unpaid tax then due from the person, and any balance due the person shall be certified to the state treasurer who shall pay the balance to the person. Such credit and payment together shall not exceed the amount of the tax originally paid.

83-D:11 Appeal. Within 30 days after notice of any adjustment of tax by the commissioner of revenue administration under RSA 83-D:10, a person may appeal the commissioner's determination either by written application to the board of tax and land appeals or by petition to the superior court in the county in which the person has a place of business or resident agent. The board of tax and land appeals or the superior court, as the case may be, shall determine the correctness of the commissioner's action de novo.

83-D:12 Administration.

I. The commissioner of revenue administration shall col-

lect the taxes, interest, additions to tax and penalties imposed under this chapter. The commissioner shall determine the expense of administration of this chapter and shall certify and pay over to the state treasurer the amount of remaining balance of the funds collected under this chapter after the expenses of administration have been deducted.

II. The commissioner shall adopt rules, pursuant to RSA 541-A, relative to:

(a) The administration of the tax imposed under RSA 83-D:3; and

(b) The recovery of any tax, interest on tax, or penalties imposed by RSA 83-D.

III. The commissioner may institute actions in the name of the state to recover any tax, interest on tax, additions to tax or the penalties imposed by this chapter.

IV. In the collection of the tax imposed by this chapter, the commissioner may use all of the powers granted to tax collectors under RSA 80 for the collection of taxes, except that the tax imposed by this chapter shall not take precedence over prior recorded mortgages. The commissioner shall also have all of the duties imposed upon the tax collectors by RSA 80 that are applicable to him. The provisions of RSA 80:26 shall apply to the sale of land for the payment of taxes due under this chapter, and the state treasurer is authorized to purchase the land for the state. If the state purchases the land, the state treasurer shall certify the purchase to the governor, and the governor shall draw his warrant for the purchase price out of any money in the treasury not otherwise appropriated.

V. The commissioner may take the oath of any person in the course of any hearing authorized under RSA 83-D:10, II. In connection with hearings, the commissioner and taxpayer have the power to compel attendance of witnesses and the production of books, records, papers, vouchers, accounts

or other documents. The commissioner and taxpayer may take the depositions of witnesses residing within or without the state pertaining to any matter under this chapter, in the same way as depositions of witnesses are taken in civil actions in the superior court. Fees of witnesses shall be the same as those allowed to witnesses in the superior court and in the case of witnesses summoned by the commissioner shall be considered as an expense of administration of this chapter.

VI. Any notice required by this chapter to be given by the commissioner to a taxpayer shall be made by first class mail to the last known address of the taxpayer, but in the case of hearings, notice shall be given at least 10 days before the date of the hearing and by certified mail.

354:2 Business Profits Tax; Credit Allowed for Tax on Nuclear Station Property. Amend RSA 77-A:5 by inserting after paragraph V the following new paragraph:

VI. Taxes paid pursuant to RSA 83-D.

354:3 Franchise Tax; Public Utility Redefined. Amend RSA 83-C:1, II to read as follows:

II. "Public utility" means every person, partnership, association and corporation except municipal corporation, engaged within this state in the manufacture, generation, distribution, transmission, or sale of gas.

354:4 Franchise Tax; Gross Receipts Redefined. Amend RSA 83-C:1, IV to read as follows:

IV. "Gross receipts" means all receipts received or accrued of the public utility from the sale of gas pursuant to franchises granted by this state. Gross receipts do not include receipts from sales of gas for use outside the state, or receipts from sales of gas to another public utility which is also subject to the payment of this tax.

354:5 Appropriation. The sum of $19,091 for the fiscal year ending June 30, 1992, and the sum of $14,693 for the fiscal year ending June 30, 1993, are hereby appropriated to the department of revenue administration for the purpose of administering the tax imposed in section 1 of this act. These sums shall be in addition to any other funds appropriated to the department of revenue administration. The governor is authorized to draw his warrant for said sums out of any money in the treasury not otherwise appropriated.

354:6 New Paragraphs; Compensation and Eligible Employee Defined. Amend RSA 77-A:1 by inserting after paragraph XXI the following new paragraphs:

XXII. "Compensation," for the purposes of RSA 77-A:5, VII, means all wages, salaries, fees, bonuses, commissions, or other items, including the following employee benefits: health, life and disability insurance and pensions, profit sharing and retirement benefits.

XXIII. "Eligible employee" means any individual employed by a business organization who, as of the last day of the applicable tax year:

(a) Has been employed by such business organization for at least 6 consecutive months;

(b) Has not been an eligible employee of such business organization or a substantially similar predecessor business organization for any prior taxable year; and

(c) Performs all but an incidental portion of services at a location or locations within the state. For the first taxable year in which the job creation tax credit allowed under RSA 77-A:5, VII, is effective, no employees employed on the first day of such taxable year shall be treated as eligible employees of such business organization for such first taxable year or any succeeding taxable year. For purposes of this paragraph, the commissioner is authorized to adopt rules pursuant

to RSA 541-A to define the terms "substantially similar predecessor business organization" and "incidental portion of services."

354:7 Factors Used in Apportionment; Apportionment Factors Adjusted. Amend the introductory paragraph of RSA 77-A:3, II(a) to read as follows:

II.(a) A fraction, the numerator of which shall be the property factor in subparagraph I(a) plus the compensation factor in subparagraph I(b) plus 1.5 multiplied by the sales factor in subparagraph I(c) and the denominator of which is 3.5, shall be applied to the total gross business profits (less foreign dividends) of the business organization to ascertain its gross business profits in this state. If this method of apportionment does not fairly represent the business organization's business activity in this state, the business organization may petition for, or the commission may require, in respect to all or any part of the business organization's business activity, if reasonable:

354:8 Determining Reasonable Compensation. Amend RSA 77-A:4, III to read as follows:

III.(a) In the case of a proprietorship or partnership, a deduction equal to a fair and reasonable compensation for the personal services of the proprietor or partners actually devoting time and effort in the operation of the business organization. The purpose of this paragraph is to permit deduction from gross business profits of a proprietorship or partnership only of such amounts as are fairly attributable to the personal services of the proprietor or partners who are natural persons, but not to permit deduction of any amounts as are fairly attributable to a return on business assets or the labor of non-owner employees of the business organization. The burden shall be upon the business organization filing the return to demonstrate the reasonableness of a deduction claimed under this paragraph, by a preponderance of the evidence. In considering the reasonableness of a deduction claimed under this paragraph, the commissioner shall consider the claimed deduc-

tion in light of compensation for personal services of employees in positions requiring similar responsibility, devotion of time, education and experience in business organizations of similar size, volume and complexity. In addition, the commissioner shall take into account the value to the business organization of the labor of its non-owner employees, and the use of the business assets of the business organization and any other factor which may reasonably assist the commissioner in making a determination as to the reasonableness of the claimed deduction.

(b) The amount of any deduction claimed under subparagraph (a) shall not exceed the amount reported as earned income from the activities of the business organization as reflected on the federal income tax returns of the proprietor or partner rendering such personal services, but may also include an amount not to exceed net rental income as compensation for operating rental property, and an amount not to exceed 15 percent of the gross selling price as commissions on the sale of business assets. Provided, that subject to the preceding sentence, a minimum deduction of $6,000 shall be allowed on account of the proprietor or each partner who is a natural person actually devoting time and effort to the operation of the business organization.

354:9 Total Amount of Credit Allowed. Amend the unnumbered concluding paragraph of RSA 77-A:5 to read as follows:

Provided, that the total amount of any credits allowable under this section shall not exceed the tax due under this chapter.

354:10 New Paragraphs; Credits for Job Creation and Capital Expenditures. Amend RSA 77-A:5 by inserting after paragraph VI the following new paragraphs:

VII. There shall be allowed a job creation tax credit equal to 15 percent of the compensation, as defined in RSA 77-A:1, XXII, paid during the taxable period to eligible employees, as defined in RSA 77-A:1 XXIII, provided, however, that in no event shall the total number of eligible employees for which the tax credit is taken exceed the increase in the total number of employees from the previous tax period to the current tax period. In the event that the excess of (a) the total number of employees in New Hampshire on the last day of the current taxable period over (b) the total number of employees in New Hampshire on the last day of the previous tax period is less than the total number of eligible employees for the current taxable period, then the total amount of compensation for which a credit may be taken shall equal such excess multiplied by the average compensation of such eligible employees. Furthermore, the total credit allowed under this paragraph shall not exceed 5 percent of the tax due under this chapter before any credits under RSA 77-A:5 are taken into account. The job creation tax credit allowed under this paragraph shall take effect July 1, 1992, and shall apply to returns and taxes due on account of taxable periods ending on or after July 1, 1992, for a period of 5 years only. The job creation tax credit allowed under this paragraph shall not be allowed for taxable periods ending on or after July 1, 1997.

VIII. In the case of a business organization which is eligible for a tax deduction for capital expenditures under section 179 of the United States Internal Revenue Code as defined in RSA 77-A:1, XX, an amount equal to 10 percent of:

(a) That portion of the cost of section 179 property situated in this state: or

(b) In the case of a taxpayer which apportions its gross business profits under RSA 77-A:3, that portion of the cost of section 179 property included in the numerator pursuant to RSA 77-A:3, II(a).

Provided, that a credit shall not be allowed for any portion of the cost of section 179 property for which an election has been taken under section 179(a) of the United States In-

ternal Revenue Code as defined in RSA 77-A:1, XX, and that in no event shall the credit allowed under this paragraph exceed 5 percent of the tax due under this chapter before any credits under RSA 77-A:5 are taken into account, and provided further, that the credit allowed under this paragraph for capital expenditures shall take effect July 1, 1991, and shall apply to returns and taxes due on account of taxable periods ending on or after July 1, 1991, but only with respect to capital expenditures incurred on or after July 1, 1991, for a period of 5 years only. The credit allowed under this paragraph for capital expenditures shall not be allowed for taxable periods ending on or after July 1, 1996.

354:11 Rate of Tax for Biennium Ending June 30, 1993, Real Estate Transfer Tax. Notwithstanding the provisions of RSA 78-B:1, I and 1989, 416:4, for the period beginning July 1, 1991, and ending June 30, 1993, the rate of the tax is $.525 per $100, or fractional part thereof, of the price or consideration for such sale, grant or transfer; except that where the price or consideration is $4,000 or less there shall be a minimum tax of $21. The tax imposed shall be computed to the nearest whole dollar.

354:12 Rate of Tax for Biennium Ending June 30, 1993, Meals and Rooms Tax. Notwithstanding the provisions of RSA 78-A, the tax imposed under RSA 78-A:6 shall be imposed as follows for the period beginning July 1, 1991, and ending June 30, 1993:

I. A tax of 8 percent of the rent is imposed upon each occupancy.

II. A tax is imposed on taxable meals based upon the charge therefor as follows:

(a) Three cents for a charge between $.36 and $.37 inclusive;
(b) Four cents for a charge between $.38 and $.50 inclusive;

(c) Five cents for a charge between $.51 and $.62 inclusive;
(d) Six cents for a charge between $.63 and $.75 inclusive;
(e) Seven cents for a charge between $.76 and $.87 inclusive;
(f) Eight cents for a charge between $.88 and $1.00 inclusive;
(g) Eight percent of the charge for taxable meals over $1.00, provided that fractions of cents shall be rounded up to the next whole cent.

354:13 Rate of Tax for Biennium Ending June 30, 1993, Communications Services Tax. For the period beginning July 1, 1991, and ending June 30, 1993, there is imposed a surcharge of 100 percent on the tax imposed under RSA 82-A:3 and 82-A:4 on the gross charge for communications services purchased at retail from a retailer.

354:14 New Section; Tax Expenditure Report. Amend RSA 77-A by inserting after section 5 the following new section:

77-A:5-a Tax Expenditure Report. On or before February 1 of every calendar year the commissioner shall certify to the general court and the governor an analysis of each of the past year's credits allowed under RSA 77-A, RSA 83-C, RSA 83-D, RSA 84, and RSA 400-A against the business profits tax imposed by this chapter.

354:15 New Sections; Application of Credit. Amend RSA 84 by inserting after section 24 the following new sections:

84:25 Application of Credit. If the bank or corporation liable for taxes imposed by this chapter is a member of a unitary business within the meaning of RSA 77-A:1, XIV, then the entire amount of the taxes due under this chapter by the individual member of such unitary business shall be allowed as a credit pursuant to RSA 77-A:5, II, against such individual member's portion of the total tax liability of the unitary

business under RSA 77-A. In the event that the individual member's credit exceeds such member's portion of the total tax liability of the unitary business, the excess of such credit shall be allowed as a credit against any other individual member's tax liability under RSA 77-A, provided such other member is also subject to the tax imposed by this chapter. The commissioner of revenue administration shall adopt rules, in accordance with RSA 541-A, to determine an individual member's portion of the total tax liability based upon each member's activity within New Hampshire.

84:26 Application of Credit to Certain New Hampshire Banks and Bank Holding Companies. Notwithstanding the provisions of RSA 84:25, any New Hampshire bank or New Hampshire bank holding company which has been subject to resolution by the state banking department or federal bank regulators during fiscal year 1992 or fiscal year 1993 shall be permitted to transfer any credit for taxes paid under this chapter during such fiscal year period to any acquiring New Hampshire business organization to be used against such acquiring business organization's tax liability under RSA 77-A. The banking commissioner and the commissioner of revenue administration may adopt rules, pursuant to RSA 541-A, to implement the provisions of this section.

354:16 Technical Correction. Amend the introductory paragraph of RSA 77-A:3, I to read as follows:

I. A business organization which derives gross business profits from business activity both within and without this state, and which is subject to a net income tax, a franchise tax measured by net income, or a capital stock tax in another state or is subject to the jurisdiction of another state to impose a net income tax or capital stock tax upon it, whether or not such tax is actually imposed, shall apportion its gross business profits so as to allocate to this state a fair and equitable proportion of such business profits. Except as provided in this section, such apportionment shall be made on the basis of the following 3 factors:

354:17 New Paragraph; Application of Credit. Amend RSA 400-A:32 by inserting after paragraph IV the following new paragraph:

V. If the insurer liable for the taxes imposed in paragraphs I and II of this section is a member of a unitary business within the meaning of RSA 77-A:1, XIV, then the entire amount of the taxes due under this chapter by the individual member of such unitary business shall be allowed as a credit pursuant to RSA 77-A:5, III, against such individual member's portion of the total tax liability of the unitary business under RSA 77-A. In the event that the individual member's credit exceeds such member's portion of the total tax liability of the unitary business, the excess of such credit shall be allowed as a credit against any other individual member's tax liability under RSA 77-A, provided such other member is also subject to the tax imposed by this chapter. The commissioner of revenue administration shall adopt rules, in accordance with RSA 541-A, to determine an individual member's portion of the total tax liability based upon each member's activity within New Hampshire.

354:18 Appropriation. The sum of $100,000 for the biennium ending June 30, 1993, is hereby appropriated to the department of revenue administration for the purpose of administering the tax expenditure report authorized in section 14 of this act. This sum shall be in addition to any other funds appropriated to the department of revenue administration. The governor is authorized to draw his warrant for said sums out of any money in the treasury not otherwise appropriated.

354:19 Nonseverability. It is the intent of the legislature that sections 1 and 2 of this act be considered a unit and their provisions inseparable. If any provision of sections 1 and 2 of this act is declared unconstitutional, then sections 1 and 2 and all of their provisions shall be invalid.

354:20 Severability. Except as provided in section 19, if

any provision of this act or the application thereof to any person or circumstance is held to be invalid, the invalidity shall not affect any other provision or the application of such provision to other persons or circumstances, and to this end the provisions of this act are severable.

354:21 Effective Date.

I. Sections 1-5 and 11-12 of this act shall take effect July 1, 1991.

II. Section 13 of this act shall take effect for gross charges collected from the taxpayer by a retailer on or after August 1, 1991, for communications services purchased at retail on or after July 1, 1991.

III. Section 8 of this act shall take effect July 1, 1991, and shall apply to returns and taxes due on account of taxable periods ending on or after January 1, 1991.

IV. Section 9 of this act shall take effect July 1, 1991, and shall apply to returns and taxes due on account of taxable periods ending on or after July 1, 1991.

V. Section 6 and the provisions of RSA 77-A:5, VII as inserted by section 10 of this act shall take effect July 1, 1992, and shall apply to returns and taxes due on account of taxable periods ending on or after July 1, 1992.

VI. Sections 7 and 16 of this act shall take effect January 1, 1992, and section 7 shall apply to returns and taxes due on account of taxable periods ending on or after December 31, 1991.

VII. The provisions of RSA 77-A:5, VIII as inserted by section 10 of this act shall take effect July 1, 1991, and shall apply to returns and taxes due on account of taxable periods ending on or after July 1, 1991, but only with respect to capital expenditures incurred on or after July 1, 1991.

VIII. Sections 15 and 17 of this act shall take effect on July 1, 1991 and shall apply to taxes and returns due on account of taxable periods ending on or after July 1, 1991.

IX. The remainder of this act shall take effect upon its passage.

[Approved July 2, 1991.]

[**Effective Date** I. Sections 1-5 and 11-12 of this act shall take effect July 1, 1991. II. Section 13 of this act shall take effect for gross charges collected from the taxpayer by a retailer on or after August 1, 1991, for communications services purchased at retail on or after July 1, 1991. III. Section 8 of this act shall take effect July 1, 1991, and shall apply to returns and taxes due on account of taxable periods ending on or after January 1, 1991. IV. Section 9 of this act shall take effect July 1, 1991, and shall apply to returns and taxes due on account of taxable periods ending on or after July 1, 1991. V. Section 6 and the provisions of RSA 77-A:5, VII as inserted by section 10 of this act shall take effect July 1, 1992, and shall apply to returns and taxes due on account of taxable periods ending on or after July 1, 1992. VI Sections 7 and 16 of this act shall take effect January 1, 1992, and section 7 shall apply to returns and taxes due on account of taxable periods ending on or after December 31, 1991. VII. The provisions of RSA 77-A:5, VIII as inserted by section 10 of this act shall take effect July 1, 1991, and shall apply to returns and taxes due on account of taxable periods ending on or after July 1, 1991, but only with respect to capital expenditures incurred on or after July 1, 1991. VIII. Sections 15 and 17 of this act shall take effect on July 1, 1991 and shall apply to taxes and returns due on account of taxable periods ending on or after July 1, 1991. IX. The remainder of this act shall take effect July 2, 1991.]

No. 119, Original

Supreme Court, U.S.
FILED
DEC 30 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF CONNECTICUT, *et al.*,

Plaintiffs,

v.

STATE OF NEW HAMPSHIRE,

Defendant.

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

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QUESTION PRESENTED

Whether the Court's original jurisdiction should be exercised where:

(a) movants have no standing because neither movants nor their citizens pay the New Hampshire nuclear property tax, and their interest, acting as *parens patriae*, is purely economic, which is insufficient to support standing for original jurisdiction;

(b) there is, established by law, an adequate administrative and judicial remedy in New Hampshire that has been bypassed, contrary to principles of comity and federalism;

(c) the factual claim that the tax burden will fall predominately on movants requires an extensive evidentiary proceeding, with particularized economic, tax and ratemaking projections, that should be conducted in the appropriate New Hampshire judicial or administrative forum;

(d) the matter is premature in that the first tax returns reflecting the impact of the tax have not been filed, and there has been no rate pass-through of tax costs to movants or their citizens;

and further where there is no merit in movants' allegations because:

(e) the nuclear property tax and tax credit apply evenhandedly at the *same* rate to *all* taxpayers, and there is not even the allegation that they are administered unfairly?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 119, Original

STATE OF CONNECTICUT, *et al.*,

Plaintiffs,

v.

STATE OF NEW HAMPSHIRE,

Defendant.

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

STATEMENT OF THE CASE

A. Introduction

The State of Connecticut, Commonwealth of Massachusetts, State of Rhode Island and Providence Plantations (collectively, "movants" or "movant states") oppose the State of New Hampshire collecting a property tax from the public utilities that own the Seabrook Nuclear Power Station. In challenging the right of New Hampshire to tax property within its borders, movants claim that the tax unlawfully burdens interstate commerce, and seek to have the Court exercise its original jurisdiction. At present, the nuclear property tax is not being borne by movants or their citizens because the affected utilities have not attempted to have the tax reflected in retail rates.

The essence of New Hampshire's nuclear property tax and property tax credit is that each taxpayer be and is treated fairly and equally. Movants concede that the tax

"may appear even-handed" (M. Br. at 8), but they argue that it is nevertheless a "discriminatory scheme" (*id.* at 33) that "classifies taxpayers into two groups" (*id.* at 34) because the tax credits and exemptions "are not available to utility owners selling to out-of-state consumers." *Id.* at 33. This portrayal of the nuclear property tax pervades movants' brief. (*Id.* at 1, 2, 8, 25, 28-30, 32-35). Further, in significant part, movants base their claim on a tax structure that does not exist—a now repealed franchise tax that was limited to *intra*state sales of electricity—rather than the existing tax laws. *Id.* at 2, 8, 25, 32, 33).

These allegations misrepresent New Hampshire law. The nuclear property tax applies to *each* owner of nuclear property at the *same* rate, regardless of residency. App. 72A. The nuclear property tax credit is available to *each* owner in the *same* degree, resident and nonresident alike. *Id.* The franchise tax, which was applicable only to in-state utilities, was repealed as to *all* electric utilities. *Id.* 77A.

The merits of the complaint, however, need not be addressed by the Court, as there are three compelling reasons why the Court's original jurisdiction should not be exercised. First, movants are not the appropriate party to bring an action. They do not pay the property tax, nor do their citizens; it is the electric utilities that are subject to the tax. Collection of the property tax does not implicate the rights of the state as sovereign. Leave to bring the action is sought purely in furtherance of economic interests, which have not been shown to be substantial, and as such movants, acting as *parens patriae*, should not have standing to invoke the Court's original jurisdiction. Further, the states' claim of standing as consumers is insubstantial and, without more, is merely a "makeweight." *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 498 (1945).

Second, the case is otherwise inappropriate for review because it requires extensive evidentiary hearings that should be conducted in an appropriate trial court. The matter cannot be disposed of by "documentary evidence

or by stipulation" (M. Br. at 13), as movants suggest, but instead would require expert economic and accounting projections as to future revenues and expenses for each owner, its business profits tax liability and the availability of nuclear property tax credits to offset such liability. In seeking an evidentiary proceeding, movants have bypassed the primary forum for adjudicating such tax matters—the New Hampshire administrative and judicial process (App. 75A)—and instead have requested this Court "awkwardly to play the role of factfinder without actually presiding over the introduction of evidence." *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 498 (1971). There is no question that the New Hampshire courts would adjudicate fairly such a claim. *See Opinion of the Justices*, 118 N.H. 343, 386 A.2d 1273 (1978). Principles of comity and federalism require that the complaint first be presented there, with review available here, if necessary.

Third, the claims of injury are unsubstantiated and premature. The actual effect of the tax is not yet known because the first tax returns reflecting its impact will not be filed until 1992. Further, the tax-paying utilities have not yet passed through the tax costs to movants or their citizens, and thus the "seriousness" of injury that is a prerequisite to review, *Colorado v. Kansas*, 320 U.S. 383, 393 (1943), is a matter of speculation.

In addition to the inappropriateness of the exercise of original jurisdiction, the motion should be denied because there is no substance to the claim for relief. As indicated, each provision of the tax law is evenhanded in its treatment of residents and non-residents. This is entirely consistent with all statutory and constitutional requirements. Any alleged disparate impact from the tax would not be due to a "discriminatory" tax, but rather to an "adventitious consideration" of no constitutional significance, *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 618 (1981), such as an inability to use the property tax credit because of a small business profits tax liability. Further, as to movants' principal argument, the statute relied upon (15 U.S.C. § 391) applies to taxes on the generation and

transmission of electricity—not to a nuclear *property* tax. The statute is inapplicable on its face, and the expansive interpretation of it sought by movants should not be embraced.

There is no valid basis for the action, much less the request for the extraordinary form of review sought here.

The "Statement" provided by movants is materially inaccurate, and a counterstatement is provided below.

B. The Seabrook I Nuclear Generating Station

The Seabrook I Nuclear Generating Station ("Seabrook") is located on the Southeastern tip of the New Hampshire coast, near the population centers of Portsmouth and Salem, New Hampshire. The plant is the only nuclear plant currently in New Hampshire, and is the last (and one of the largest) nuclear stations to be built in New England. The plant has engendered substantial civic anxiety and concern, resulting in 15 years of public demonstrations and protests, many involving arrests.

Seabrook was planned and built by a consortium of New England utilities, and each utility is a joint owner of the plant. Public Service Company of New Hampshire ("PSNH") is the largest owner, with a 35.5% ownership interest. The other two New Hampshire co-owners, the New Hampshire Electric Cooperative and EUA Power Corporation, have a combined 14.3% ownership interest, resulting in New Hampshire corporations owning 49.8757% of Seabrook.

Construction and completion of the plant was delayed due to regulatory changes in the wake of the Three Mile Island nuclear accident, spiraling construction costs, and lawsuits seeking to forestall the plant's operation because of concerns regarding its safety. The plant ultimately went into operation in 1990 at a cost exceeding $6 billion, which is more than seven times its original estimate. The construction delays and cost impacts ultimately pushed PSNH, the State's largest utility, into bankruptcy in 1988, and

later caused the other two New Hampshire joint owners also to declare bankruptcy.

C. The Tax on Nuclear Station Property

Enacted in 1991, the nuclear property tax levies a charge of 0.64% on every dollar of assessed valuation of nuclear property within New Hampshire. App. 72A; RSA 83-D:3.[1] The tax applies to each owner of nuclear property "in the proportion that such person's ownership interest bears to the entirety of the ownership in the property." App. 72A; RSA 83-D:5. There is no differentiation in rate or application as to in-state and out-of-state taxpayers. The tax applies only to electric utilities, not movants or their citizens.

D. The Business Profits Tax Credit

New Hampshire taxes the "business profits" of corporations doing business in the State (App. 27A-52A), including "unitary businesses" having interests in more than one state. App. 33A. The out-of-state owners of Seabrook are taxed as unitary businesses. There are various tax credits available to offset a business profits tax liability, as enumerated in RSA 77-A:5. App. 44A. In 1991, a property tax credit was added to allow an offset equal to the amount due under the nuclear property tax. App. 72A; RSA 83-D:6. All nuclear property owners are subject to the business profits tax, and the tax credit is available to each taxpayer incurring nuclear property tax liability. The property tax credit may be claimed for tax year 1991 and beyond, with the first tax return reflecting such credit due on January 15, 1992.

E. The Franchise Tax

Prior to 1991, all utilities selling electricity in the State were subject to a franchise tax in the amount of one percent on the gross receipts from sales of electricity *within* New Hampshire. App. 23A; RSA 83-C:2. Sales in

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[1] The New Hampshire Revised Statutes Annotated are referred to as "RSA ___."

interstate commerce were not subject to the tax, and there was no compensating tax imposed on utilities in New Hampshire selling in interstate commerce. In 1991, the franchise tax was repealed as to electric utilities. App. 77A. No owner of Seabrook is subject to it.[2]

F. These Proceedings

Movants brought this action seeking an evidentiary proceeding and injunctive relief under the Court's original jurisdiction. No administrative review action was lodged, and no judicial proceeding was brought, in New Hampshire. The affected utilities have not contested the tax, although they are liable for it and they may do so under established procedures. App. 75A; RSA 83-D:10, 83-D:11.

REASONS FOR DENYING THE MOTION

I. THE EXERCISE OF ORIGINAL JURISDICTION WOULD BE INAPPROPRIATE HERE

"It has long been this Court's philosophy that 'our original jurisdiction should be invoked sparingly.' " *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972). Original cases represent an "intrusion on society's interest in [the Court's] most deliberate and considerate performance of [its] paramount role as the supreme federal appellate court." *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 505 (1971). Original "jurisdiction is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute . . . ." *Louisiana v. Texas*, 176 U.S. 1, 15 (1900).

The exercise of original jurisdiction is appropriate only where the "essential quality of the right asserted"[3] and the "seriousness and dignity of the claim"[4] require it and

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[2] Movants recite that the out-of-state owners of Seabrook received "no similar benefit" from the repeal (M. Br. at 8 n.3). This is because they bore no tax burden prior to the repeal, and therefore had an advantage over intrastate uitilities.

[3] *Massachusetts v. Missouri*, 308 U.S. 1, 18 (1939).

[4] *Illinois*, 406 U.S. at 93.

where there is no other forum "where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had." *Illinois*, 406 U.S. at 93. It has long been accepted that original jurisdiction should not be exercised unless there is a showing of the "strictest necessity." *Wyandotte Chemicals Corp.*, 401 U.S. at 505. Movants have failed to make the required showing.

A. There Is No Injury To The States, Either As Sovereigns Or As *Parens Patriae*, And The Claim Of Harm To The State As Consumer Is A "Makeweight"

The grant of original jurisdiction recognizes that there are disputes between states that affect fundamental sovereign rights and are of sufficient importance and rarity that they may be heard directly by this Court. U.S. Const. art. III, § 2, cl. 2; 28 U.S.C. § 1251(a). The sovereign interests of a state ordinarily justifying the exercise of original jurisdiction include, *inter alia*, rights in water,[5] in state boundaries,[6] and other matters affecting the state as polity.[7]

The Court also has recognized that a state, acting as *parens patriae*, may have standing, but "only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer for the personal claims of its citizens." *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976); *accord Oklahoma v. Cook*, 304 U.S. 387, 394 (1938). Such quasi-sovereign interests include protecting the "health, comfort and welfare" of the citizenry. *Pennsylvania v. West Virginia*, 262 U.S. 553, 591-92 (1923). In such a case, the interest must affect "the gen-

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[5] *Wisconsin v. Illinois*, 278 U.S. 367 (1929), *superseded by* 388 U.S. 426 (1967); *Colorado v. Kansas*, 320 U.S. 383 (1943); *Colorado v. New Mexico*, 467 U.S. 310 (1984).

[6] *Ohio v. Kentucky*, 410 U.S. 641 (1973); and cases cited in *North Dakota v. Minnesota*, 263 U.S. 583 n.1 (1924).

[7] These matters are discussed extensively in *Maryland v. Louisiana*, 451 U.S. 725, 760-771 (1981) (Rehnquist, J., dissenting).

eral population of a State in a substantial way." *Maryland*, 451 U.S. at 737. Movants acknowledge that "a state may not invoke this Court's original jurisdiction as a nominal party on behalf of individual citizens" (M. Br. at 17), but assert their standing primarily on the basis that the tax causes a "significant injury to most of the citizens of these states." M. Br. at 18.

The character of the "injury" alleged here, however, is merely economic, does not implicate the state as a political entity, and does not affect the health and welfare of the citizenry. If original jurisdiction could be invoked to pursue an economic interest affecting "most of the citizens," virtually any tax or regulation on utilities or other providers of basic services would require this Court's attention, resulting in a vast and unwarranted expansion of its caseload.

This pure economic interest is readily distinguishable from the claims brought in *Pennsylvania v. West Virginia* and *Maryland v. Louisiana*. (*Compare* M. Br. at 18). *Pennsylvania v. West Virginia* involved a potential cut-off in the supply of home heating fuel, thereby threatening the "health, comfort and welfare" of the citizenry. 262 U.S. at 591-92. The tax in *Maryland v. Louisiana* "implicate[d] serious and important concerns of federalism" (451 U.S. at 744) because it concerned the "paramount rights" of the United States in gas extracted from its lands (451 U.S. at 730), and "interfere[d] with the FERC's authority to regulate . . . the sale of natural gas to consumers." *Id.* at 749.[8]

Finally, movants have no standing as consumers of electricity. Movants have referred to their gross electric bill payments, but have not suggested that they are currently paying higher rates from the tax, and have not estimated what the rate increases might be. M. Br. at 16. There is

[8] The Federal Energy Regulatory Commission has not "entered the controversy" here (M. Br. at 21), and its only role would be to consider the pass-through of the tax costs in rates, just as it would any cost of service.

no assertion that the charges would be of "serious magnitude," as required. *Alabama v. Arizona*, 291 U.S. 286, 292 (1934). Without more, the claim of consumer standing is simply a "makeweight." *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 450 (1945); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907).

B. Prompt And Appropriate Relief Is Available In Other Fora

There is no necessity, "strictest" or otherwise (*Wyandotte Chemicals Corp.*, 401 U.S. at 505), that the Court accept jurisdiction because there is "another forum where there is jurisdiction" to hear the matter. *Illinois*, 406 U.S. at 93. New Hampshire provides the right to administrative review of the property tax (App. 75A; RSA 83-D:10), and to judicial review in the New Hampshire courts. App. 75A; RSA 83-D:11. Residents and non-residents may seek review. There is no question that the New Hampshire courts would responsibly consider any complaint by out-of-state interests. *See Opinion of the Justices* 118 N.H. 343, 386 A.2d 1273 (1978). Moreover, the state has an undeniable interest in "setting its own house in order." *Ohio Bureau of Employment v. Hodory*, 431 U.S. 471, 480 (1977).

Movants suggest they might not have standing to sue in New Hampshire because they do not pay the nuclear property tax, nor do their citizens. M. Br. at 23 n.11. As indicated, this apparent lack of standing is what makes the exercise of original jurisdiction inappropriate,[9] and surely if they lack standing in New Hampshire that cannot serve as a basis for the action here. In any event, movants have not even sought relief in New Hampshire and should not be heard to say that it is unavailable. Otherwise, original jurisdiction could be obtained simply by bypassing the state forum, and then claiming it to be unavailable or

[9] *See Arizona v. New Mexico*, 425 U.S. 794, 797-98 (1976) ("we are not unmindful that the legal incidence of the electrical energy tax is upon the utilities"). *Cf. Kansas v. Utilicorp*, 110 S. Ct. 2807 (1990) (antitrust action must be brought by utility, not state acting as *parens patriae*).

inadequate. It is noteworthy that the principal authority relied upon by movants, *Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979), followed the ordinary path of review through the state courts after this Court declined to accept original jurisdiction because the state court "provides an appropriate forum in which the *issues* tendered here may be litigated." *Arizona v. New Mexico*, 425 U.S. 794, 797 (1976) (emphasis in original). Moreover, the right to review in New Hampshire is available to the taxpaying utilities,[10] and if they fail to pursue their rights, their state regulators could take appropriate action to shield ratepayers from any unnecessary costs.[11]

C. An Extensive Trial Would Be Required, And It Necessarily Would Draw Resources Away From The Court's Appellate Docket

This matter cannot be resolved merely by "documentary evidence or by stipulation" (M. Br. at 13), as movants suggest. The *factual* issue raised, *i.e.*, whether the tax burden falls "almost entirely" on out-of-state interests (M. Br. at 6), if pursued, would require expert testimony of a technical nature, such as economic, tax and ratemaking projections as to the revenues and liabilities of each Seabrook owner, forecast over a period of years; the projection of the "business profit" of each owner, and the portion of such profit attributable to New Hampshire interests; and projections as to possible offsets from the property tax credit or other tax credits, such as the investment tax credit. These projections would be offered by qualified experts, on the record, with an opportunity for cross-ex-

[10] On October 4, 1991, the joint owners of Seabrook sought confirmation from New Hampshire that if an administrative appeal of the tax were sought by the joint owners, it could be commenced after January 15, 1992.

[11] Subsequent to the complaint, one Seabrook co-owner, EUA Power Corp., notified the State, by letter of December 13, 1991, that it will seek to have the United States Bankruptcy Court determine the constitutionality of the nuclear property tax before making another payment.

amination. Issues of credibility could be raised, if appropriate. *Compare* M. Br. at 13.

After receiving the evidence and procuring a master's report, the Court would be required "awkwardly to play the role of factfinder without actually presiding over the introduction of evidence." *Wyandotte Chemicals Corp.*, 401 U.S. at 498. This "awkward" task, however, need not be undertaken here, because there is an adequate remedy available in New Hampshire. Moreover, as then-Justice Rehnquist stated in *Maryland v. Louisiana*, there are important prudential considerations militating against the expenditure of the Court's time and resources on such an inquiry:

> Over 40 years ago, when the Court's docket was considerably lighter than it is today, Chief Justice Hughes articulated the concern that accepting original jurisdiction cases "in the absence of facts showing the necessity for such intervention, would be to assume a burden which the grant of original jurisdiction cannot be regarded as compelling this Court to assume and which might seriously interfere with the discharge by this Court of its duty in deciding the cases and controversies appropriately brought before it." Massachusetts v Missouri, 308 US 1, 19, 84 L Ed 3, 60 S Ct 39 (1939). The Court has recognized that expending its time and resources on original jurisdiction cases detracts from its primary responsibility as an appellate tribunal. "The breadth of the constitutional grant of this Court's original jurisdiction dictates that we be able to exercise discretion over the cases we hear under this jurisdictional head, lest our ability to administer our appellate docket be impaired." Washington v General Motors Corp. 406 US 109, 113, 31 L Ed 2d 727, 92 S Ct 1396 (1972).

451 U.S. at 762 (Rehnquist, J., dissenting).

D. The Request for Relief Is Premature

The request for relief is premature because the actual impact of the property tax is not yet known. The action is unripe (and movants' standing in question) because there has not been a measurable rate impact from the tax on movants or their citizens. Each taxpayer is a regulated utility that must receive state regulatory approval before passing through its expenses in retail rates (*i.e.*, rates to ultimate consumers). At present, none of the taxpaying utilities have requested approval to recover its tax costs. It is also unclear whether the appropriate state regulatory bodies would approve such a request.[12] At present, the utilities and their shareholders are bearing the tax costs, not movants or their citizens.[13] Moreover, the first estimated property tax payment was made in September 1991, but tax returns reflecting the tax payments or offsets from use of the property tax credit will not be filed until 1992, so that even the impact on the *utilities* is as yet unknown.

E. The Injury Complained Of Is Not Serious

Even if tax returns had been filed reflecting actual tax impacts, and even if there had been a retail rate pass-through, movants would remain obligated to show that the property tax had caused them injury of a "serious magnitude." *Alabama v. Arizona*, 291 U.S. 286, 292 (1934); *Colorado v. Kansas*, 320 U.S. 383, 393 (1943). This must

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[12] In such a rate proceeding, movants ordinarily would have standing to contest the inclusion of the tax costs in rates.

[13] Movants address the matter in a footnote (M. Br. at 17 n.7), but do not claim that there has been a rate pass-through of tax costs to consumers. Much is made of *wholesale* cost pass-throughs to other *utilities*, but there is no suggestion that a substantial number of ultimate consumers are bearing higher rates. *Id.* Movants also advert to a Connecticut regulatory commission decision (*id.*), which purports to estimate a tax "cost" to Connecticut ratepayers, but it does not say that a request had been made to pass the cost through to ratepayers. App. 65A.

be established by clear and convincing evidence. *New York v. New Jersey*, 256 U.S. 296, 309 (1920).

Movants primarily avoid the issue of seriousness of the harm alleged. Movants recite that the combined tax liability of the out-of-state utilities will be $14 million (M. Br. at 18), but do not factor in an offset for the property tax credit. Movants also provide a calculation of the gross electric rates paid by each state on a yearly basis (*id.* at 16), but do not calculate the actual rate impact *from the tax*.[14]

These circumstances are in sharp contrast to the potential harm demonstrated in cases relied upon by movants. In *Pennsylvania v. West Virginia*, the injury was a complete cessation of deliveries of natural gas, which threatened to cut off supplies of home heating fuel. 262 U.S. at 591-92. In *Maryland v. Louisiana*, the tax impacted gas supplies, had an economic impact of at least $150 million annually, and affected consumers in 30 states. 451 U.S. at 729, 731, 737. The injury alleged here does not compare and, moreover, as indicated, it is presently a matter of speculation as to what, if any, injury there will be.

Having failed to establish that this matter would be appropriate for original jurisdiction, the motion for leave to file the complaint should be denied.

II. THE MOTION FOR LEAVE TO FILE SHOULD BE DENIED BECAUSE THE ARGUMENTS RAISED ARE WITHOUT MERIT

Even should the Court find movants' interest of the kind warranting review, and that the New Hampshire courts

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[14] Movants also do not quantify the rate impact on their citizens, which is not likely to be "serious." For example, Connecticut's largest utility is a co-owner of Seabrook, and the impact of the tax on its rates may be calculated by dividing the estimated property tax due by units of electricity sold, which is then multiplied by the average electricity usage of a residential consumer. Even without an offset for tax credits, the resulting impact on such a Connecticut consumer is believed to be approximately 27 cents per year.

are unavailable for relief, the motion does not state a substantive claim meriting review. To prevail on the merits, movants must establish that the nuclear property tax is imposed disproportionately on interstate commerce and, in turn, that this results in an unlawful and discriminatory burden on such commerce. Alternatively, they must establish that the nuclear property tax discriminates against interstate commerce, pursuant to 15 U.S.C. § 391. The movants fail in both efforts and thus fail to allege a cause of action from which the Court may grant relief.

A. The Nuclear Property Tax is Consistent With 15 U.S.C. § 391 and Does Not Discriminate on Any Basis

In claiming that the nuclear property tax violates 15 U.S.C § 391, movants ask the Court to ignore the plain meaning of the statute and, instead, focus on the operation of other provisions of the New Hampshire tax system. In doing so, they ask that the Court provide an unprecedented interpretation of the statute. Movants argue that "[b]y repealing the Franchise Tax and establishing a credit against [the] Business Profits Tax . . ., the Seabrook Tax violates [15 U.S.C. § 391]." M. Br. at 25.

Section 391 provides:

> No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers or consumers of that electricity.

The statute goes on to define discrimination:

> For purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

15 U.S.C. § 391.

To be barred by 15 U.S.C. § 391, a tax must, in the first instance, apply "to the generation or transmission of electricity" and also impose a disproportionate burden on electricity in interstate commerce. Section 391 of 15 U.S.C. does not apply to the nuclear property tax, but if it did, neither the nuclear property tax nor any combination of New Hampshire taxes discriminates against interstate commerce. Thus, movants reliance on 15 U.S.C. § 391 is misplaced.

1. Section 391 Does Not Apply To The Nuclear Property Tax

Section 391 of 15 U.S.C. applies to taxes "on or with respect to the generation or transmission of electricity." 15 U.S.C. § 391. The provision was "directed specifically" to taxes on *generation* or *transmission*, "not to the entire tax structure" of a state. *Arizona Public Service Co. v. Snead*, 441 U.S. 141, 149 (1979). The tax was enacted specifically to invalidate New Mexico's tax law (*id.* at 147-48), which was "concededly a tax on the generation of electricity." *Id.* at 149.

The nuclear property tax is not a tax on the "generation or transmission of electricity." It is a tax on nuclear *property*, assessed as a percentage of the valuation of the property. The distinction is real and substantive. While receipts from a tax on generation or transmission vary with the output of a generation facility or the use of a transmission line, receipts from a property tax are fixed by the property's value. The nuclear property tax is applied to the value of property owned by a taxpayer, without concern for the address of the owner or where the electricity is ultimately sold. There is no requirement that the tax be paid by any entity other than the owner of nuclear property that, with appropriate regulatory approvals, is free to include the expense in the price of its product or to absorb the cost as it sees fit.[15] The amount

[15] The out-of-state Seabrook owners may choose to sell the electricity from Seabrook to one of New Hampshire's five electric utilities or three municipal systems, and thereby collect some portion of the tax obligation from New Hampshire citizens.

of nuclear property tax paid by any utility is controlled strictly by the amount of its investment in nuclear property in New Hampshire.

Movants ignore these distinctions, and argue that the nuclear property tax is "in effect" a tax on generation or transmission "notwithstanding that the tax takes the form of a tax on property." M. Br. at 26-27. There is no substance to this assertion, and it is precluded by the plain terms of the statute, which are conclusive. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240-41 (1989); *see Mallard v. United States District Court*, 490 U.S. 296, 300 (1989). As the Court stated in *Snead*, "[t]o look narrowly to the type of tax the federal statute names, rather than to consider the entire tax structure of the State, is to be faithful not only to the language of that statute but also to the expressed intent of Congress in enacting it." 441 U.S. at 149-150. Section 391 simply does not apply.

2. Movants Fail To Allege Facts Establishing That The Nuclear Property Tax Violates The Anti-Discrimination Provision Of 15 U.S.C. § 391

Even if the Court were to apply 15 U.S.C. § 391, the nuclear property tax is consistent with its substantive requirements. The nuclear property tax is assessed on each owner of nuclear property in New Hampshire regardless of whether it is a foreign or domestic corporation. App. 72A. The same rate is applied to determine the tax owed by each taxpayer, and tax liability is controlled by the taxpayer's ownership interest in Seabrook. *Id.* All taxpayers have the same right to challenge the tax in New Hampshire. App. 75A. All taxpayers receive the same property tax credit against the business profits tax. App. 72A. None of the nuclear property owners is subject to the New Hampshire franchise tax. App. 77A.

Movants, however, allege that the tax credit and the repeal of the franchise tax facially discriminate against interstate commerce (M. Br. at 25) because, as a factual matter, the property tax will fall more heavily on out-of-state utilities than on New Hampshire utilities. *See* M. Br.

at 1, 6. As indicated, the tax and tax credit apply equally to all property owners, and thus 15 U.S.C. § 391 is satisfied. Moreover, what movants seem to suggest is an expansive interpretation of 15 U.S.C. § 391 that would be destructive to taxes on multistate generating units. For example, approximately 51% of the Seabrook plant is owned by out-of-state utilities, resulting in approximately 51% of all its costs, including taxes, included in the charges of electricity in interstate commerce.[16] The nuclear property tax applies in proportion to the ownership interest so that each owner bears its fair share of the tax. Movants' argument would preclude this, and would mean that the tax would, by definition, be discriminatory because it would fall more heavily on interstate commerce. Such a rule would place in question any tax levied on a generating plant that is more than 50% owned by out-of-state interests, and thus discourage multi-state cooperation in building large generating units.

This was not the intent of Congress in enacting 15 U.S.C. § 391. "The federal statute does not prevent a state from taxing the generation and transmission of electricity, but only requires that interstate and intrastate generation and transmission be treated equally." *Pacific Power & Light v. Montana Dep't of Revenue*, 773 P.2d 1176 (1989), *cert. denied*, 493 U.S. 1049 (1990). This is precisely what the property tax accomplishes.[17]

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[16] EUA Power Corp., a New Hampshire corporation, owns 12.1% of Seabrook, and sells its electricity in, essentially, the spot market because there is no "firm" market for the power. The percentage of EUA power sold in New Hampshire is unknown, as is the amount of Seabrook-generated electricity sold to New Hampshire utilities by the out-of-state Seabrook owners.

[17] If, instead of tenants in common, Seabrook were owned by a single corporation, with a consortium of utilities holding stock interests, the corporation itself would be liable for the nuclear property tax and the net expense would, presumably, be allocated to the utility shareholders on a per-share basis. There could be no claim of "discriminatory" burden in this circumstance. Under movants' argument, the constitutionality of the tax would turn on the form of corporate ownership, not

Finally, the nuclear property tax is not "virtually identical" to the tax in *Snead*. M. Br. at 29. The New Mexico statute allowed a tax credit only for "electricity generated inside [New Mexico] and consumed in this state." 441 U.S. at 143 n.4. Accordingly, the "tax-credit provisions . . . insure[d] that locally consumed electricity is subject to *no* tax burden . . ., while [interstate electricity] . . . is subject to a 2% tax, since it is sold outside the State." *Id.* at 149 (emphasis in original). In contrast, the New Hampshire property tax credit applies equally to in-state and out-of-state owners. There is no discrimination of any kind in its application. Similarly, the franchise tax does not apply to any electric utility.[18] The nuclear property tax bears no relation to the tax in *Snead*.

B. The Nuclear Property Tax Is Applied Evenhandedly, And In No Way Discriminates Against Interstate Commerce

1. The Nuclear Property Tax Is Consistent With Established Tests

It is well settled that "interstate commerce must bear its fair share of the state tax burden," *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 620 n.9 (1981), and "may constitutionally be made to pay its way." *Maryland*

on whether the tax and credits or exemptions apply evenhandedly to each taxpayer.

[18] In claiming injury due to the franchise tax repeal, movants invite the Court to consider what the State's tax code was or should be. It should be self-evident that a state may repeal a tax if doing so is appropriate. Permitting claims that such a repeal is "discriminatory" would require that the State, instead, broaden the tax so that all possible interests were taxed, which is not required. *Carmichael v. Southern Coal Co.*, 301 U.S. 495, 509 (1937). Indeed, the Court has stated that "[w]e could strike down this tax as discriminatory only if we substituted our judgment on facts of which we can be only dimly aware for a legislative judgment that reflects a vivid reaction to pressing fiscal problems." *Lehnhausen v. Lake Shore Auto Parts*, 410 U.S. 356, 365 (1973). There is no reason for the Court to abandon this deference to the states. Similarly, the Court in *Snead* confined its inquiry "narrowly to the type of tax the federal statute names, rather than to consider the entire tax structure of the State." 441 U.S. at 150.

v. Louisiana, 451 U.S. 725, 754 (1981). "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden . . . ." *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938). A state may lawfully tax interstate commerce "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

The New Hampshire nuclear property tax meets each test. The nexus with the state, *i.e.*, the property, is direct and substantial, and is not in dispute here. The tax is fairly apportioned. Each taxpayer pays only "in the proportion that such person's ownership interest bears to the entirety of the ownership in the property." App. 72A; RSA 83-D:5. There is no possibility of multiple taxation by different states. No other state could lawfully tax the Seabrook property.

The tax does not promote local business or discriminate against interstate commerce. Both local and interstate owners are taxed at the same rate. Each taxpayer may apply its tax liability as a credit against the business profits tax. App. 44A (RSA 77-A:5); App. 72A (RSA 83-D:6). No affected taxpayer is subject to the franchise tax, which was repealed as to electric utilities. App. 77A. No local business is favored. No out-of-state business is encouraged to move in-state or do business there.

The tax is fairly related to services provided by the State. It helps defray the general expenses of state government, which pay for police and fire protection and for highways and bridges, and provide for an educated workforce, a judicial system, and maintenance of the general welfare. The tax also accounts for the unique burdens associated with the property, including the danger inherent in the production of nuclear energy, and its waste, as the Legislature so found. App. 71A-72A; RSA 83-D:1. After

the accidents at Three Mile Island and Chernobyl, there can be no serious question that the mere existence of a nuclear power plant places a unique burden on the host state.

2. Movants Have No Support In The Case Law

Movants contend that the nuclear property tax is not fairly apportioned, discriminates against interstate commerce, and is not fairly related to services provided by the State. Each argument is addressed in turn.

a. Movants state that the tax "is not fairly apportioned" (M. Br. at 33), but provide not the slightest explanation or authority in support thereof. In fact, the property tax is apportioned on the basis of each utility's interest in the Seabrook nuclear station (App. 72A; RSA 83-D:5), and nothing in this is unfair. There is no possibility of multiple taxation by different states. *See Armco, Inc. v. Hardesty*, 467 U.S. 638, 644 (1984). The property is located solely within New Hampshire, and no other state could properly tax it.

b. Movants concede that the nuclear property tax "may appear even-handed" (M. Br. at 8; *see id.* at 32), but argue that the tax credit and franchise tax repeal create a "discriminatory scheme" that is "precisely the same" as that in issue in *Maryland v. Louisiana*. M. Br. at 33. The argument does not withstand close scrutiny.

In *Maryland v. Louisiana*, Louisiana sought to impose a "first use" tax on natural gas that was produced off-shore on *federal* land, 98% of which was for resale in interstate commerce. 451 U.S. at 729. Louisiana had "no sovereign interest in being compensated for the severance of resources from the federally owned OCS land." *Id.* at 759. Further, through a series of facially discriminatory exemptions and credits which applied only to those doing business in Louisiana, the state sought to encourage in-state gas production and shield in-state consumers from the tax. These provisions included: (1) exempting off-shore gas from the tax if it was subsequently consumed *within* Louisiana (*id.* at 756); (2) allowing taxpayers with production facilities *within* Louisiana to apply their first-use tax liability as a tax credit against state severance tax obligations, with the "obvious economic effect . . . to encourage . . . mineral exploration and development within Louisiana" (*id.* at 757); and (3) allowing consumers of gas or electricity *within* Louisiana to apply any increased costs due to the first-use tax as a credit against other tax liabilities. *Id.* at 757.[19]

Here, in contrast, the tax is levied on nuclear property located within New Hampshire, for the clearly stated purpose that the property poses unique risks and cost burdens on the State. App. 71A-72A. The tax is applied even-handedly to each owner in proportion to its ownership interest. App. 72A. The tax does not encourage companies to locate, or do business, in New Hampshire. The business profits tax credit is available to *all* taxpayers. App. 44A; App. 72A. The franchise tax was repealed, and is a non-issue. App. 77A.[20] There is no valid comparison with *Maryland v. Louisiana*.

c. Movants also state that the tax is not "fairly related" to services provided by New Hampshire, arguing that the "specific burdens" imposed by the plant are compensated adequately through other levies and funds. M. Br. at 33. This simply is incorrect.

The nuclear property tax is not a "user fee" or a "specific charge" for state services, but rather, like the severance tax in *Montana*, is "imposed for the general support of the government." *Compare* 453 U.S. at 621 *with* App.

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[19] The tax scheme found invalid in *Snead* likewise provided a tax credit only to "electricity generated inside [New Mexico] and consumed in this state." 441 U.S. at 143 n.4.

[20] Movants assert that a risk exists that other states will "attempt to retaliate," leading to "Balkanization." M. Br. at 33. The intent of this statement is unclear, but other states may lawfully tax their nuclear property, just as other property in the *situs* state, and there would be nothing ostensibly untoward in their doing so. Indeed, Vermont has, for 20 years, taxed its nuclear property, which is owned by most of the same out-of-state Seabrook owners. 32 Vt. Stat. Ann. §§ 8601, 8661.

72A. *See also* 453 U.S. at 624 ("a severance tax is like a real property tax, which has never been doubted as a legitimate means of raising revenue by the situs state"). Thus, the tax need not be limited, as movants' suggest, to recovering for "specific" burdens associated with the taxed activity, but rather the revenues may contribute to "the cost of providing 'police and fire protection, the benefit of a trained work force, and the advantages of civilized society.' " *Montana*, 453 U.S. at 624 (quoting *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207, 228 (1980)). "[I]nterstate commerce may be required to contribute to the cost of providing *all* governmental services, including those services from which it arguably receives no direct 'benefit.' " *Id.* at 627 n.16 (emphasis in original).[21]

3. Movants' Factual Arguments Do Not State A Cause Of Action

The premise underlying movants' complaint is that a tax cannot be imposed if it primarily will be borne by interstate commerce. M. Br. at 1, 2, 6, 8, 10, 32; Complaint ¶ 29A. Movants argue that the tax burden "will fall almost entirely on out-of-state consumers" (M. Br. at 6), and that this indicates a Constitutional violation. *Id.* at 32; Complaint ¶ 29A. The premise is fallacious.

This Court has long rejected the notion that "a state tax must be considered discriminatory for purposes of the Commerce Clause if the tax burden is borne primarily by out-of-state consumers." *Montana*, 453 U.S. at 618; *accord Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 258-259 (1922); *cf. Goldberg v. Sweet*, 488 U.S. 252, 265-66 (1989). It is the settled rule that so long as a tax, such as the nuclear property tax, "is computed at the same rate regardless of the final destination of the [power], and there

[21] The "relevant inquiry . . . is not . . . the *amount* of the tax or the *value* of the benefits," but rather is whether the "*measure* of the tax [is] reasonably related to the extent of the contact." *Montana*, 453 U.S. at 625-626 (emphasis in original). Here, the property tax, like the severance tax in *Montana*, is measured as a percentage of the value of the property. *Compare* App. 72A *with* 453 U.S. at 626.

is no suggestion . . . that the tax is administered in a manner that departs from this evenhanded formula," there is no constitutional infirmity. *Montana*, 453 U.S. at 618.

Further, in most cases, as here, the impact of a tax, and any associated credits, will vary in each year, depending on a number of factors, such as the taxpayer's income, if any, its deductions, the availability of other credits, carryforwards and carry-backs of the same, and other factors. Thus, a factual inquiry into the *source* of any disparity in tax burden would be cumbersome and complex, and the alleged "disparity" would often be due to "adventitious considerations,"[22] *not* the operation of the tax. For example, here it appears that *the most* that could be claimed is a "disparity" in tax liability where an out-of-state taxpayer does not have sufficient business profits tax liability to claim the full nuclear property tax credit. This would not be due to a "discriminatory" statute, but rather would occur because of the fortuity of a small business profits tax bill.

Moreover, the entire discussion of the factual assertion is relegated to two footnotes (M. Br. at 9 n.4, 18 n.8), with only the unsupported assertion that "it is clear" that only PSNH would benefit from the tax credit. *Id.* at 9 n.4.[23] Based on an interpolation of 1991 tax data, it is projected, on information and belief, that PSNH will *not* be able to avail itself of the property tax credit for at least five years, and thus will bear *all* of its property tax in the interim, while most out-of-state utilities *will* be able to employ the credit and benefit therefrom starting with the first tax return in 1992. This, however, is not the

[22] *Montana*, 453 U.S. at 618; *Heisler*, 260 U.S. at 259. *Cf. Amerada Hess Corp. v. Director, Division of Taxation*, 490 U.S. 66, 78 (1989).

[23] Movants also extract selective quotes from the floor debates in purporting to demonstrate the "discriminatory nature and intent of the tax." M. Br. at 10 n.6. But "[w]hether any statute or action of a state impinges upon interstate commerce depends upon the statute or action, not upon what is said about it or the motive which impelled it." *Heisler*, 260 U.S. at 259.

issue. The property tax and the tax credit apply at the *same* rate and are available to *all* taxpayers. There is nothing in the Court's decisions proscribing this. Any factual inquiry may be addressed, if need be, in an administrative or judicial action in New Hampshire.

C. The Nuclear Property Tax Is Consistent With The Equal Protection Clause Of The Fourteenth Amendment

"The States . . . have broad powers to impose and collect taxes . . . [and] may divide different kinds of property into classes and assign to each class a different tax burden so long as those divisions and burdens are reasonable." *Allegheny Pitts. Coal Co. v. County Comm'n of Webster County*, 488 U.S. 336, 344 (1989); *accord Exxon Corp. v. Eagerton*, 462 U.S. 176, 196 (1983) (state "legislatures have especially broad latitude in creating classifications and distinctions in tax statutes"). In taxing commerce, a state "is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value." *Allied Stores v. Bowers*, 358 U.S. 522, 527 (1959). A state tax need only be "rationally related to achievement of a legitimate state purpose." *Western & S. Life Ins. Co. v. State Board of Equalization*, 451 U.S. 648, 668 (1981).[24]

Movants' "equal protection" argument is premised on the misrepresentation that the property tax "classifies taxpayers into two groups" because the "tax credits and exemptions . . . are not available to utility owners selling to out-of-state consumers." M. Br. at 33. This, as indicated, is simply false, as is plain on the face of the statute. App. 23A, 33A, 44A, 72A. The property tax applies to all owners at the same rate, the tax credit is available to all owners in the same degree, and the franchise tax, as repealed, applies to no owner. Each taxpayer is treated equally.[25]

[24] As with the Privileges and Immunities Clause (*see infra*), the Equal Protection Clause protects persons, not states, *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976), and movants' citizens do not pay the tax.

There is no contention that nuclear property is not a distinct class of property that may be taxed by the state. Instead, the argument is that the tax "does not further that interest" because its alleged "stated purpose"—to "compensate" the state for the "burdens caused" by nuclear power—is met by other funds and levies. M. Br. at 34.

The purpose of the tax is not to raise revenue for specific burdens, but rather "to help defray the public charges of government." App. 72A. These charges contribute to the provision of public roads and bridges, an educated workforce, a judicial system, and the protection of the general welfare. Further, the charges contribute to the provision of police and fire protection, including for public demonstrations and protests at Seabrook, participation by local officials in the development of a nuclear emergency response plan (App. 53A; RSA 107-B:1), regulations as to the transportation of hazardous materials within the State (RSA 21-P:11(I)), and investigations as to accidents caused by public utilities (RSA 374:37). The Seabrook owners clearly avail themselves of these general rights, services and protections, and there is nothing improper in levying a tax to insure they support their fair share of the costs of state government.

D. There Is No Privileges and Immunities Clause Issue

Movants assert a claim under the Privileges and Immunities Clause, Art. IV, § 2 (M. Br. at 35-36), but it does not appear that they have standing to do so. A state is not a "citizen" under the Clause, and has no right of action thereunder. *Pennsylvania v. New Jersey*, 426 U.S. 660,

[25] For this reason, the argument that there is "no rational basis for distinguishing between in-state and out-of-state consumers" (M. Br. at 34) is also without merit, misstating as it does the operation of the tax.

665 (1976). The state may sue as *parens patriae* on behalf of its citizens, but the "citizens" of movants' states are *not* subject to the tax. *Compare id.* at 665. It is the utilities to which the tax applies, but they are corporations, and also are not "citizens" within the meaning of the Clause. *Western & S. Life Ins. Co. v. State Bd. Equalization*, 451 U.S. 648, 656 (1981); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 177-78 (1869). If the tax-paying utility has no cause of action, there should be no derived right of action on behalf of its ratepayers.

There is no substance to the claim, even were the Clause to apply. The Clause ensures that "citizens of one State coming within the jurisdiction of another are guaranteed equality of treatment." *Austin v. New Hampshire*, 420 U.S. 656, 660 (1975); *accord Toomer v. Witsell*, 334 U.S. 385, 395 (1948). As indicated, each property owner, resident and nonresident, is taxed at the same rate, has available to it the business profits tax credit, and is not subject to the franchise tax.

III. THERE HAS BEEN NO PROPER REQUEST FOR PRELIMINARY RELIEF

The Complaint seeks a preliminary injunction or the escrowing of funds (p. 12), but the request is then orphaned. There is no motion for preliminary injunction or other relief (paralleling Fed. R. Civ. P. 65), as should be required. S. Ct. R. 17.2. There is no request for preliminary relief in movants' brief. *See* M. Br. at 37. There is not even the suggestion that irreparable injury could be shown, as the law requires. *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 506 (1959). In fact, any taxes found to have been wrongly collected would be refundable, with interest, under New Hampshire law (App. 75A; RSA 83-D:10), and the ratepayers, it is expected, could be reimbursed in rates for any overcollections. Further, there has been no showing that the other prerequisites to preliminary relief—likelihood of success on the merits, no harm to the defendant, and consistency with the public interest—are present. The matter has not been properly presented, and

would be insubstantial if it were. It should not be considered.

CONCLUSION

For the foregoing reasons, the motion for leave to file a complaint should be denied.

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In The

Supreme Court Of The United States

October Term, 1991

STATE OF CONNECTICUT,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS
Plaintiffs,

v.

STATE OF NEW HAMPSHIRE
Defendant

REPLY BRIEF OF THE STATE OF CONNECTICUT, THE COMMONWEALTH OF MASSACHUSETTS, AND THE STATE OF RHODE ISLAND IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

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REPLY BRIEF OF THE STATE OF CONNECTICUT, COMMONWEALTH OF MASSACHUSETTS, AND STATE OF RHODE ISLAND IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

The State of Connecticut, Commonwealth of Massachusetts, and State of Rhode Island hereby reply to specific points made by the State of New Hampshire ("defendant") in its recently filed Brief in Opposition to Motion for Leave to File Complaint, in order to clarify a number of mischaracterizations and errors in that brief.

I. NEW HAMPSHIRE HAS MISCHARACTERIZED THE NATURE AND EFFECT OF THE SEABROOK TAX.

The most serious error in New Hampshire's brief is its mischaracterization of the nature and effect of the New Hampshire "Tax on Nuclear Station Property" ("Seabrook Tax"), with its concomitant scheme of tax credits and exemptions. New Hampshire disingenuously, if not misleadingly, states that the tax is simply a property tax which "applies to each owner of nuclear property at the *same* rate, regardless of residency." (Defendant's br. 2). (emphasis in original). Similarly, New Hampshire characterizes the tax credit scheme as "available to *each* owner in the *same* degree, resident and nonresident alike," while noting that the former franchise tax "was repealed as to *all* electric utilities." (Defendant's br. 2) (emphasis in original). New Hampshire in effect asks this Court to read the Seabrook Tax package with blinders on, ignoring the clear intent and effect of the statute, which is to impose the tax ultimately almost entirely on out-of-state residents. This Court declined a similar invitation in *Maryland v. Louisiana*, 451 U.S. 725 (1981), stating:

> A state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme. "In each case it is our duty

to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce."

Id. at 756. (citations omitted)[1]

A review of the entire tax package creating the Seabrook Tax while simultaneously establishing the tax credit and exemption reveals that it was intended to benefit in-state utilities and their customers almost exclusively, while visiting virtually the entire burden of the Seabrook Tax on out-of-state consumers of electricity. This tax package could well have been modeled after the tax packages determined to be illegal in *Maryland v. Louisiana, supra,* and in *Arizona Public Service Co. v. Snead,* 441 U.S. 141 (1979).

Although New Hampshire advises this Court that the business profits tax credit built into the Seabrook Tax package may be claimed by out-of-state owners to the same extent as in-state owners, it knows full well that such a "benefit" is illusory as it relates to out-of-staters: because of the apportionment formula utilized in New Hampshire for the calculation of the business profits tax by unitary businesses, RSA 77-A:3, the out-of-state owners who sell primarily to out-of-state consumers will derive virtually no benefit from this credit, while New Hampshire owners who sell electricity primarily to New Hampshire consumers may take its full benefit.

Similarly, the exemption created in the franchise tax for electric utilities benefits only those utilities which sell electricity within New Hampshire. In fact, as of March 1, 1992, some New Hampshire customers will begin paying *lower* electric rates as a direct result of the Seabrook Tax package, while many out-of-state customers are *already* paying higher rates. As with the New Mexico tax scheme struck down in *Arizona Public Serv. Co. v. Snead, supra,* and the Louisiana scheme struck down in *Maryland v. Louisiana, supra,* New Hampshire has attempted to use creative drafting to circumvent the law. However, the discriminatory intent and effect of the Seabrook Tax is just as transparent as were the New Mexico and Louisiana tax schemes, and the tax should be dispatched by this Court as quickly as possible.

[1] Similarly, in *American Trucking Assn. v. Scheiner,* 483 U.S. 266 (1987), the Court addressed the discriminatory nature of flat taxes applied to motor carrier vehicles. On its face, the tax in question applied equally to both in-state and out-of-state registered trucks. However, the fee for registered in-state truckers was reduced by the amount of the flat motor carrier tax.

The Court concludes at p. 296:

"The great constitutional purpose of the Fathers cannot be defeated by using an apparently neutral 'guise of taxation which produces the excluding or discriminatory effect.' *Nippert v. Richmond,* 327 U.S. 416, 426, 66 S.Ct. [586,] 591, (1946)."

II. THE PLAINTIFF STATES HAVE STANDING TO BRING THIS SUIT, AND THIS IS AN APPROPRIATE CASE FOR THE EXERCISE OF THIS COURT'S ORIGINAL JURISDICTION.

A. The Plaintiff States Have Alleged Direct Injury to Themselves and to Their General Populations Sufficient to Establish Standing, and Have Already Suffered Actual Injury.

1. Contrary to New Hampshire's assertion, (Defendant's br. 7-9) the plaintiff States have alleged injury flowing directly from the imposition of the Seabrook Tax both to themselves and to a large portion of their combined populations as purchasers of large quantities of electricity from utilities subject to the Seabrook Tax. The plaintiff States have alleged that the tax imposed on these utilities has been or will be passed on to them in the form of higher electricity rates. This is precisely the same situation as existed in *Maryland v. Louisiana,* in which a First Use Tax was imposed on pipeline companies and not directly on the ultimate consumers. This Court unequivocally rejected Louisiana's identical argument that this type of injury, suffered when the ultimate consumers pay the cost of the tax through higher rates, was insufficient to confer standing on the plaintiff States. This Court found standing

based on the "substantial and real" injury suffered by the States and their citizens in the form of higher rates. *Id.* at 736-37.

2. Nor is the request for relief "premature," as New Hampshire has argued. (Defendant's br. 12). Unlike the situation before the Court in *Arizona v. New Mexico*, 425 U.S. 794 (1976), in which the affected utilities had chosen not to pay the tax while they pursued a state court challenge to its constitutionality, in the present case the utilities have *already made* an estimated tax payment to New Hampshire, in accordance with New Hampshire law. New Hampshire's claim that the tax returns have not yet been filed is frivolous. The first estimated tax payment has been made to New Hampshire, and this is sufficient to establish injury.

Further, many customers in the three plaintiff States have already begun paying higher rates to reflect the increased utility costs caused by the assessment and payment of the Seabrook Tax. In Massachusetts, hundreds of thousands of customers have already had their electric rates increased to reflect the Seabrook Tax, and nearly a million more are scheduled to have their rates increased as of March 1, 1992. In Rhode Island, a pass-through of the tax to electric rates has already been put into effect in December, 1991 as to some customers, and many more will begin paying higher rates shortly. In Connecticut, the Department of Public Utility Control ("DPUC") has already noted that the tax paid by Connecticut utilities is unquestionably a cost which may be included in customer rates. (See DPUC ruling, Addendum to plaintiffs' principal brief pp. 62A-66A).

Thus, the plaintiff States and their citizens have already begun paying higher rates, or inevitably will be forced to pay them, as a direct result of the Seabrook Tax. This is not a speculative injury in any sense of the word. There is no need to wait until every single customer sees his rate increased to justify having the issue resolved by this Court.

B. The Injury Alleged by the Plaintiffs Is of a Serious Magnitude, Affecting Millions of Consumers in Three New England States

New Hampshire does not dispute the plaintiffs' claim that the injury to the plaintiff States and their citizens will total approximately $14 million per year, or nearly a half billion dollars over the useful life of Seabrook Station. Instead, they attempt to denigrate the impact on an individual consumer's electricity bill (Defendant's br. 13, n.14), asking the Court to conclude that such an injury, even if unconstitutional, is not worth the Court's time. Even if New Hampshire's projections of individual dollar increases were accurate, which they are not, this Court should reject such an offensive and self-serving argument.

This Court observed in *Maryland v. Louisiana* that the exercise of original jurisdiction was warranted in part because, given the relatively small amounts paid by each consumer in increased gas rates, those individual consumers were unlikely to bring a challenge to Louisiana's tax. *Id* at 739. The relatively small individual amounts involved did not cause the Court to deem the entire challenge insignificant. On the contrary, the Court focused on the aggregate injury of an anticipated $150 million tax passed on to millions of consumers in over 30 states. *Id.* at 743-44. The present case presents proportionately almost an exact replica of the injury suffered in that case. The Seabrook Tax will result in approximately $14 million in increased rates annually to millions of consumers in three New England States – a region which has been buffeted by both recession and an historic reliance on expensive foreign oil as an energy source. The magnitude of this injury to these citizens and this region is enormous, particularly since the Seabrook Tax directly conflicts with federal energy policy promoting the peaceful use of nuclear power, 42 U.S.C § 2011 *et. seq.*, and encouraging regional cooperation in the generation and transmission of electricity, 15 U.S.C. § 391.

C. No Adequate Alternative Forum Exists in Which to Challenge the Tax

New Hampshire does not contest the plaintiffs' assertion that the plaintiff States and their citizens would be unable to seek a New Hampshire administrative review and refund of the Seabrook Tax because they do not pay the tax directly. Nor does New Hampshire dispute the fact that the utilities which do pay the tax have not asserted a constitutional challenge to it. The possibility of a New Hampshire state court remedy remains speculative at best. Rather, the appropriate forum in which to contest the Seabrook Tax is in this Court through the exercise of the Court's original jurisdiction, which appears to be the only means through which the plaintiffs can obtain a federal forum to resolve issues of federal law and national significance. *See Wyoming v. Oklahoma*, ___ U.S. ___, 108 S.Ct. 2893 (1987).

D. An Extensive Fact-Finding Hearing Would Not Be Required to Determine the Legality of the Seabrook Tax

Contrary to New Hampshire's claim, an extensive hearing involving the testimony of experts and assessments of credibility would *not* be required to determine the legality of the Seabrook Tax. Virtually all of the relevant evidence can be presented through documents, such as corporate records, tax returns, and regulatory commission records, establishing the extent of ownership interests and the impact of the Seabrook Tax and credits. While New Hampshire claims possible factual disputes, it does not identify even *one* paragraph in the complaint which alleges a disputed fact. Rather, New Hampshire attempts to create factual issues centering around projected usage and exact dollar impact, which are not relevant to the central issue of the tax's constitutionality. The *fact* of the discriminatory impact, rather than its precise dimensions, is what is at issue.

III. THE SEABROOK TAX RAISES IMPORTANT AND SUBSTANTIAL FEDERAL QUESTIONS AND IS IN CONFLICT WITH FEDERAL LAW AND APPLICABLE DECISIONS OF THIS COURT.

New Hampshire also opposes the plaintiffs' motion on the grounds that the substantive "arguments raised are without merit." (Defendant's br. 13). However, each attempt by New Hampshire to refute the serious statutory and constitutional allegations raised by the plaintiffs fails.

At the heart of New Hampshire's entire argument is its improper characterization of the nature and effect of the Seabrook Tax. As discussed *supra*, the entire tax package results in the imposition of virtually the entire burden of the tax on out-of-state consumers, while shielding, and even benefitting, in-state consumers. As such, the tax violates a number of federal statutory and constitutional provisions.

A. The Seabrook Tax Is in Conflict with 15 U.S.C. § 391.

1. In very broad language, Congress clearly provided that no state may utilize its taxing authority to discriminate against out-of-state consumers of electricity.

> **Tax on or with respect to generation or transmission of electricity.** No State, or political subdivision thereof, may impose or assess a tax *on or with respect to* the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section a tax is discriminatory if it results, *either directly or indirectly*, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.
>
> 15 U.S.C. § 391, (emphasis added)

New Hampshire claims in its brief at pp. 15-16 that the Seabrook Tax is "not a tax on 'the generation or transmission of electricity,'" but is simply "a tax on nuclear *property*." (Emphasis in original). In making this argument, New Hampshire conveniently overlooks the statutory words "or with respect to" the generation or transmission of electricity. The Seabrook Tax, which applies solely to the only nuclear generating plant in New Hampshire, was imposed for the stated purpose of compensating the state for the "unique public safety requirements and burdens" purportedly arising from the generation of electricity in the plant. *See* Declaration of Purpose and Findings, RSA 83-D:1, c.354, of the 1991 New Hampshire Laws, Addendum to plaintiffs' principal brief, pp. 71A-72A. That being the case, it cannot be seriously disputed that the tax is imposed "with respect to the generation or transmission of electricity" as that term is used in 15 U.S.C. § 391. New Hampshire's argument is at odds with the language of the law and with accepted tenets of statutory construction.

2. Contrary to New Hampshire's assertions, the net effect of the Seabrook Tax package is to impose a greater tax burden on electricity transmitted in interstate commerce than on electricity transmitted in intrastate commerce. Nothing in *Arizona Public Service Co. v. Snead, supra*, suggests, let alone requires, that the Court may ignore parts of the *same statute* in deciding a claim under § 391. Quite the contrary. The Court must look at the effect of the entire package. *As a direct result of the Seabrook Tax package*, out-of-state consumers are already paying higher rates for electricity, while some New Hampshire customers face a rate *decrease*. Unquestionably, the Seabrook Tax conflicts with the express language of 15 U.S.C. § 391.

B. The Seabrook Tax Is Patently Discriminatory, Favoring New Hampshire Consumers Over Out-of-State Consumers, and Is in Violation of the Commerce Clause.

The tax on the Seabrook Plant, in concert with the credit of the business profits tax and the exemption in the franchise tax, is discriminatory both in design and effect. The parallel between the New Hampshire scheme and the Louisiana First Use Tax addressed in *Maryland v. Louisiana*, 451 U.S. 725 (1981), is striking, and this Court's analysis in that case is equally applicable here.

C. The Seabrook Tax Violates the Equal Protection Clause.

Under the Equal Protection Clause, the burden of taxation associated with the Seabrook Plant should be borne equally by all the owners of the plant and ultimately by their customers, regardless of their residence. As has been demonstrated, there is unequal treatment without a constitutionally recognized rational basis. Through the system of tax credits and exemption enacted along with the tax, disparate treatment occurs which violates the Fourteenth Amendment.

D. The Seabrook Tax Violates the Privileges and Immunities Clause, and This Claim Has Been Properly Raised in This Action.

The cost of the Seabrook Tax is being and will continue to be paid through the electric bills of the consumers in the three plaintiff States. Virtually the entire populations of Connecticut and Rhode Island, along with a substantial portion of the Massachusetts population, have been affected. These persons have rights under the Privileges and Immunities Clause which may be asserted by the plaintiff States in their *parens patriae* capacities. The sovereign interest of the plain-

tiff States in protecting the welfare of virtually their entire populations is at the very heart of this action. This case is thus unlike *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976) cited in New Hampshire's brief at pp. 25-26.

IV. THE PLAINTIFF STATES HAVE PROPERLY REQUESTED RELIEF

In their complaint, the plaintiff States have sought declaratory and injunctive relief. Contrary to New Hampshire's assertion (Defendant's br. 26), the requested relief is appropriate, and the plaintiffs have properly alleged all necessary elements to obtain it. *See, Maryland v. Louisiana, supra*, 451 U.S. 760.

Respectfully submitted,

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In The Supreme Court of the United States
October Term, 1991

**STATE OF CONNECTICUT,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS**

Plaintiffs,

v.

STATE OF NEW HAMPSHIRE

Defendant.

**Motion for Leave
To File A Complaint**

BRIEF OF AMICI CURIAE NEW ENGLAND COUNCIL AND ASSOCIATED INDUSTRIES OF MASSACHUSETTS IN SUPPORT OF MOTION

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INTEREST OF AMICI

This brief is filed on behalf of The New England Council and the Associated Industries of Massachusetts (the "Amici"). Amici are organizations whose members and supporters include nearly all of the largest non-governmental employers and users of electric energy in New England. The New England Council is a non-profit business organization representing over 450 firms and institutions in the six-state region. The Council monitors and seeks to improve federal and state policies which affect the region's economic and business climate. Associated Industries of Massachusetts is a non-profit, state-wide organization of over 3000 members charged with improving the state's economic climate and supporting policies which will promote the prosperity of the state's citizens. Amici's members also include businesspeople and professional persons who are interested in the economic impact of electricity costs in New England and who are concerned about regional economic trends.

As representatives of New England's largest consumers of electricity which will ultimately pay the bulk of the tax at issue, Amici represent a viewpoint different from that of the states which are the plaintiffs and defendant in this action and different from the utilities that, in the first instance, pay the tax.

Pursuant to Supreme Court Rule 37.2, Amici have obtained consent for the filing of this amicus brief from counsel for the plaintiff states and from counsel for the defendant state of New Hampshire.

INTRODUCTION

Amici accept and incorporate by reference the Jurisdiction and Statement sections of the Brief In Support of Motion for Leave to File Complaint submitted by the plaintiff states (the "States' Brief").

ARGUMENT: WHY LEAVE SHOULD BE GRANTED

I. THIS COURT HAS ORIGINAL AND EXCLUSIVE JURISDICTION OVER THIS ACTION.

This case involves a dispute between three states which face the imposition of a burden upon them and their citizens and a fourth state which has created and will profit from that burden. Thus it unquestionably falls directly within the literal language of Art. III, §2, cl. 2 of the Constitution, which provides this Court with original jurisdiction over cases in which "a State shall be a party" and 28 USC §1251(a) which gives the Court "original and exclusive jurisdiction of all controversies between two or more states."

This is not a dispute between private citizens and a state in which the citizens have enlisted the good offices of their state to serve as a substitute champion. Rather, each of the complaining states here has already suffered, and will continue to suffer, financial injury both to its own proprietary assets and to those of its citizens as a result of New Hampshire's action in collecting the tax imposed by 1991 N.H. Law c. 354 (H.B. 64)(the "Seabrook Tax"). This case therefore presents a "proper controversy under [the Court's] original jurisdiction . . . " Maryland v. Louisiana, 451 U.S. 725, 735 (1981)(citations omitted).

The indisputable facts which demonstrate these conclusions are stated at pages 16 - 19 of the States' Brief. The Seabrook Tax has already affected electricity rates in the three southern New England states and, since the plaintiff states are major electricity users, the tax already is causing them direct financial injury. More generally, by raising the costs of electricity to the citizens of those states, the Seabrook Tax has already injured those citizens, both absolutely and in relation to citizens of New Hampshire. The Seabrook Tax has thus already allowed one state to achieve a favored economic position as a result of its discriminatory exercise of sovereign power.

II. THIS IS AN APPROPRIATE CASE FOR THE EXERCISE OF ORIGINAL JURISDICTION.

This Court has "substantial discretion . . . to make case-by-case judgments" as to whether individual cases are appropriate for the exercise of its original and exclusive jurisdiction. Texas v. New Mexico, 462 U.S. 554, 570 (1983). The standards the Court applies to reach those judgments are "prudential" and "equitable." California v. Texas, 457 U.S. 164, 168 (1982). This Court has considered such factors as the nature and seriousness of the claim, the availability of another forum in which the claim may be resolved and the interests of the United States in resolution of the claim. See, e.g. Maryland v. Louisiana, 451 U.S. 725, 744-45 (1981); Arizona v. New Mexico, 425 U.S. 794, 796-97 (1976).

Each of those factors supports the exercise of original jurisdiction here. As demonstrated in the States' Brief, there is a "serious" claim here that the Seabrook Tax violates the Commerce Clause, U.S. Const. art I, §8, cl. 3, and 15 USC §391. Furthermore, the essential "nature" of those claims, discrimination against out-of-state users of power, involves basic issues of federalism and the structure of the nation's electric system and so supports the States' position. This case also directly implicates significant federal interests, both in the efficient functioning of a national electric supply system as evidenced by 15 USC §391 and in the development of nuclear energy as evidenced by 42 USC §§2011-13.

As the States' Brief notes, at 23, n.11, there is serious doubt whether any court other than this one could hear this case at all. The utilities which are required to pay this tax may be barred from the federal courts by the Tax Injunction Act, 28 USC §1341. Furthermore, of course, since those companies can pass the entire burden of the tax onto their customers, their interest in litigating this matter will necessarily be limited.

On the other hand, the individuals and businesses that will ultimately bear the burden of the Seabrook Tax face a number of obstacles. First, the Eleventh Amendment, U.S. Const. amend XI, prevents a direct challenge by individuals to the state of New Hampshire. Even if creative pleading could avoid that barrier, individual plaintiffs would still face the Tax Injunction Act. Finally, individuals would have no cause of action in their home state courts against New Hampshire because the tax has no direct extraterritorial effect.

Thus both the utilities that pay the tax and the individuals who bear the ultimate burden would likely be forced to resort to the New Hampshire state courts for adjudication of the constitutionality of a state law under which New Hampshire would annually realize $14 million in tax revenues paid almost exclusively by out-of-staters. There is no need to cast aspersions on the courts of New Hampshire because, as the drafters of the Original Jurisdiction clause understood, there necessarily will always be "suspicions of partiality" when one state's courts are asked to adjudicate an issue where that state's interests directly conflict with the interests of other states. See Massachusetts v. Mellon, 262 U.S. 447, 481 (1923).

III. PRUDENTIAL CONSIDERATIONS FAVOR THE EXERCISE OF ORIGINAL JURISDICTION.

In addition to the factors the States cite in their brief which warrant the exercise of original jurisdiction, Amici wish to note several other factors which also support this Court's exercise of its discretion to hear this case pursuant to its original jurisdiction.

First, self-serving bad ideas spread fast. At least two other New England states which house nuclear power plants are already considering retaliatory legislation modelled after the Seabrook Tax that would enable them to export some of their tax burden to citizens of other states. And, of course, there is no reason why

economic Balkanization need be limited to nuclear power stations. So long as New Hampshire can successfully use its position astride a regionally important asset to extract tribute from other states, legislators in other states will look for similar opportunities, whether that involves upstream water or air resources, major regional employers, transportation bottlenecks or any other asset that might be creatively exploited.

While some, perhaps most, of these stratagems would ultimately be found illegal, that would come only after expensive litigation and significant economic dislocations. If, as Amici believe, this Court's prior decisions demonstrate that such laws would be "precisely the sort of protectionist regulation that the Commerce Clause declares off-limits to the states," New England Power Co. v. New Hampshire, 455 U.S. 331, 339 (1982), this Court should act speedily to remove the incentive states now face to gamble that, despite those precedents, they can nonetheless find a "free lunch." The fastest way would be to hear this case now, rather than waiting years for some party to struggle through the lower federal courts or those of the state of New Hampshire.

Second, the longer this litigation lasts, the more money will be irretrievably transferred from the three southern New England states to the state of New Hampshire. Unquestionably, the Eleventh Amendment will bar utilities from using the federal courts to recover money paid pursuant to the Seabrook Tax. See, e.g., Papasan v. Allain, 478 U.S. 265, 278 (1986); Edelman v. Jordan, 415 U.S. 651 (1974). Any retroactive state court remedy that would allow the utilities to recover taxes they paid and return that money to their ratepayers is speculative at best.

Third, Amici believe the Seabrook Tax poses particularly serious harm to the region's economy because its consequence is to drive New England's energy costs, already the nation's highest, still higher. A region already struggling through the deepest economic slump in half a century should not be saddled with an

illegal, extraterritorial burden on the cost of an essential resource for the many years it make take for this case to wind through the lower state or federal courts.

Finally, the Seabrook Tax stands as a present barrier to rational regional planning in energy and other areas. Indeed, so long as New Hampshire is perceived as successfully asserting its local interests over those of neighboring states, regional cooperation on virtually any issue will be made more difficult, if not impossible. Amici, who represent the major businesses in the New England region, believe that it is already difficult enough to site regional waste facilities, new airports, prisons or any other project that annoys or disturbs a minority of citizens. The Seabrook Tax is simply the affirmative statutization of the beggar-thy-neighbor principal more commonly seen in its negative form as the "NIMBY" (not in my back yard) syndrome. A decision in favor of the States in this case would be a strong blow against local economic parochialism and in favor of the national market.

That last point may offer the single best reason why this case should be heard by this Court as soon as possible. In 1992, the historically divided nations of Western Europe will create a single market that stretches from the North Sea to the Mediterranean. Yet, the contrary process of dissolution is occurring elsewhere in Europe as the former Soviet Union and Yugoslavia fragment into smaller and smaller economic units. Like planets orbiting the sun, every economic system faces a constant tension between centripetal forces that work for increased economic coordination and centrifugal forces that work for protectionism and particularism. In this country, however, the balance between those forces was struck, once and for all time, by the framers of the Constitution when they chose to establish a single, national market in 1789. Amici suggest that this Court use this case to reaffirm that message.

IV. CONCLUSION

For the reasons stated above, Amici believe the Court should grant the motion of Connecticut, Massachusetts and Rhode Island for leave to file a complaint against the state of New Hampshire.

Respectfully submitted,

THE NEW ENGLAND COUNCIL and ASSOCIATED INDUSTRIES OF MASSACHUSETTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF CONNECTICUT, *et al.*,

Plaintiffs,

v.

STATE OF NEW HAMPSHIRE

Defendant.

ANSWER OF DEFENDANT STATE OF NEW HAMPSHIRE

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IN THE

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OCTOBER TERM, 1991

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STATE OF CONNECTICUT, *et al.*,

Plaintiffs,

v.

STATE OF NEW HAMPSHIRE

Defendant.

ANSWER OF DEFENDANT STATE OF NEW HAMPSHIRE

Defendant State of New Hampshire answers the Complaint of the States of Connecticut and Rhode Island and the Commonwealth of Massachusetts, as follows:

JURISDICTION AND STANDING

Complaint ¶ 1: The exclusive original jurisdiction of this Court is invoked under the Constitution of the United States, art. III, § 2, cl. 1 and 2 ("controversies between two or more States"), and 28 U.S.C. § 1251(a)(1)(1991). Plaintiffs have no other plain, speedy or adequate remedy at law.

ANSWER: Admitted that Plaintiffs seek to invoke this Court's original jurisdiction but denied that this is an appropriate case for the exercise of original jurisdiction and denied that Plaintiffs have standing to complain that the New Hampshire tax on Nuclear Station Property (the "Nuclear Property

Tax") violates any provision of the Constitution or federal law. Further answering, the State of New Hampshire states that the utilities which pay the Nuclear Property Tax have a plain, speedy and adequate remedy under New Hampshire law to challenge the validity of the tax.

Complaint ¶ 2: This action seeks a declaratory judgment, pursuant to 28 U.S.C. §§ 2201-2202 (1991), that the State of New Hampshire's "Tax on Nuclear Station Property," 1991 N.H. Laws c. 354 (to be codified as New Hampshire Revised Statutes Annotated ("RSA") chapter 83-D) (hereinafter the "Seabrook Tax"), a copy of which is attached hereto as Exhibit A and incorporated herein by reference, violates the rights and protections afforded to plaintiffs by the United States Constitution under art. VI, cl. 2 (Supremacy Clause); art. 1, § 8 (Commerce Clause); the Equal Protection Clause of the Fourteenth Amendment; and art. IV, § 2, cl. 1 (privileges and Immunities Clause). This suit also seeks to enjoin permanently the enforcement of the Seabrook Tax.

ANSWER: Admitted that Paragraph 2 describes the relief Plaintiffs seek in this action.

Complaint ¶ 3: The plaintiffs are the sovereign State of Connecticut, with its capital located in Hartford, Connecticut; the Commonwealth of Massachusetts, with its capital located in Boston, Massachusetts; and the State of Rhode Island, with its capital located in Providence, Rhode Island. Plaintiffs bring this action in their proprietary capacities as substantial purchasers of electricity from owners of the Seabrook Station, the only property to which the Tax on Nuclear Station Property applies. Plaintiffs also bring this

action in their parens patriae or quasi-sovereign capacities, as guardians of the health, welfare, and economic prosperity of the citizens of their states.

ANSWER: Admitted, except that the State of New Hampshire denies that Plaintiffs have standing to bring this action in their proprietary capacities or their *parens patriae* or quasi-sovereign capacities and is without knowledge or information sufficient to form a belief whether Plaintiffs are substantial purchasers of electricity from the utility owners of Seabrook Station.

Complaint ¶ 4: The Defendant is the sovereign State of New Hampshire, with its capital located in Concord, New Hampshire.

ANSWER: Admitted.

THE NEW HAMPSHIRE TAX

Complaint ¶ 5: The Seabrook Tax makes three changes in New Hampshire's tax law. First, it imposes an ad valorem tax upon the value of nuclear station property at the rate of 0.64 percent of valuation to be assessed annually. Chapter 354.1 (H.B. 64, § 1) to be codified as RSA 83-D:1. Second, it amends New Hampshire's Franchise Tax to exclude electric utilities from the definition of "public utility" and exclude sales of electricity from the Franchise Tax's coverage. Chapter 354.3 and 4 (H.B. 64, §§ 3 and 4), amending RSA 83-C:1, II and IV. Third, it allows electric utilities a credit against any liability they have under New Hampshire's Business Profits Tax to the extent of the amount paid by such entities pursuant to the Seabrook Tax. Chapter 354:2 (H.B. 64 § 2), amending RSA 77-A:5.

ANSWER: Denied that Chapter 83-D in the N.H. Rev. Stat. Ann., entitled "Tax On Nuclear Station Property," does anything other than establish a tax on Nuclear Station Property at the rate of 0.64 percent of the valuation of such property, to be assessed annually. Other sections of H.B. 64 amend different provisions of New Hampshire tax law and these sections are separate actions of the legislature and are not part of the "Tax on Nuclear Station Property." Admitted that these other changes include the repeal of the Franchise Tax as applied to electric utilities, described in the third sentence of paragraph 5 of the Complaint, and the addition of a new paragraph VI in the list of credits against the Business Profits Tax, in this case for the amount of Nuclear Property Tax paid by *any* utility, whether or not located in New Hampshire.

Complaint ¶ 6: There is only one nuclear power station in New Hampshire, the Seabrook Station, and therefore only one property subject to the Seabrook Tax.

ANSWER: Admitted.

Complaint ¶ 7: Seabrook Station is jointly owned by utilities and municipal electric cooperatives located in, or selling electricity directly or indirectly to consumers located in, the States of New Hampshire, Connecticut, Massachusetts, Rhode Island, and Vermont. Public Service Company of New Hampshire ("PSNH"), an electric utility located in New Hampshire, and making retail sales of electricity to New Hampshire customers, is the single largest owner of Seabrook Station, with a 35.6 percent share. Other New Hampshire utilities own a total of 2.17 percent of Seabrook Station. The United Illuminating Company and the Connecticut Light and Power Company, which are utilities located in Connecticut, and making retail sales of electricity exclusively to Connecticut customers, own 17.5 percent and 4.06 percent, respectively, of Seabrook Station. Utilities located within and/or selling electricity at retail to Massachusetts consumers own a total of 28.06 percent of Seabrook Station. Specifically, Massachusetts Municipal Wholesale Electric Cooperative owns 11.6 percent, New England Power Company owns 10 percent, Canal Electric Company owns 3.5 percent, Montaup Electric Company owns 2.9 percent, Taunton Municipal Lighting Plant owns 0.1 percent, and Hudson Light & Power owns 0.07 percent of Seabrook Station. EUA Power owns 12.13 percent of Seabrook. Although EUA Power is a New Hampshire corporation, it is strictly a wholesale generation company with no retail customers in New Hampshire. Utilities located in the State of Vermont own the remaining 0.41% share.

Each of the Seabrook joint owners is engaged at the Seabrook Station in the generation or transmission of electricity in interstate commerce. The Federal Energy Regulatory Commission (FERC) regulates the wholesale sale of electricity between some of the Seabrook joint owners and their retail subsidiaries or other utilities. State regulatory authorities regulate certain retail sales of electricity by some of the joint owners.

ANSWER: Admitted as to the ownership interests, except that, in addition to the 35.6% interest of Seabrook Station's largest owner, Public Service of New Hampshire, other New Hampshire utilities (which include EUA Power) own 14.3% of the facility, making the ownership interest of New Hampshire utilities approximately 49.9%. Admitted that the remaining utilities mentioned in Paragraph 7 of the Complaint have the

approximate ownership interests alleged and have retail customers in Connecticut and Massachusetts as alleged, but the State of New Hampshire is without knowledge or information sufficient to form a belief concerning the ultimate destination of each utility's share of the electricity generated at Seabrook, which may be sold and delivered to other utilities and their retail customers in other states, including New Hampshire. Additionally, the State of New Hampshire qualifies its answer with respect to the percentage interest of New England Power Company in that New England Power Company owns (and allocates a percentage of all of its expenses including the Nuclear Property Tax, to) a New Hampshire corporation, Granite State Electric Company serving retail customers in New Hampshire. Further answering, the State of New Hampshire states that utilities in plaintiff State of Connecticut own a total interest in Seabrook Station of only 21.56% and utilities in plaintiff Commonwealth of Massachusetts own, at most, only a 28.06% interest. Utilities in plaintiff State of Rhode Island and Providence Plantations own no interest in Seabrook Station. After allocating to Granite State Electric Company its proportionate share of New England Power Company's ownership interest in Seabrook, the State of New Hampshire is informed and believes that New Hampshire utilities are responsible for in excess of 50% of Seabrook costs, including the Nuclear Property Tax. With respect to the last paragraph of paragraph 7, the State of New Hampshire admits that some of the joint owners of Seabrook are engaged in the generation and transmission of electricity in interstate commerce, but denies that all of the electricity enters interstate commerce. The State of New Hampshire admits the remaining allegations in the last paragraph of paragraph 7.

Complaint ¶ 8: The Seabrook Tax is imposed upon each entity with an ownership interest in Seabrook Station in the same proportion as that entity's ownership interest bears to the entirety of the total ownership of Seabrook Station property.

ANSWER: Admitted.

Complaint ¶ 9: For 1991 the Seabrook Tax requires that Seabrook Station be valued at no more than $3,500,000,000 and that estimated tax payments be based on a valuation of $3,500,000,000. Based on this statutory valuation, the total liability to be paid to New Hampshire by the owners of Seabrook Station is $22,400,000 annually. For 1991, the tax is deemed to have been assessed as of April 1, 1991, with the first estimated tax payment due on September 15, 1991.

ANSWER: Admitted.

Complaint ¶ 10: Prior to its amendment by the Seabrook Tax to exclude electric utilities, the New Hampshire Franchise Tax (hereinafter "Franchise Tax"), RSA 83-C:1 et seq., had been imposed on public utilities at the rate of 1 percent of all gross receipts from the sale of gas or electricity within the State of New Hampshire pursuant to franchises granted by the state, generating approximately $6 million in tax revenue annually from New Hampshire corporations. Prior to the enactment of the Seabrook Tax, the Franchise Tax applied to the New Hampshire owners of Seabrook Station, but not to the owners selling electricity exclusively to out-of-state customers, since only the New Hampshire utilities received receipts from the sale of electricity pursuant to franchises granted by the State of New Hampshire. The Seabrook Tax

wholly eliminated the previously existing liability of New Hampshire electric utilities to pay the Franchise Tax.

ANSWER: Denied that the "Seabrook Tax" eliminated New Hampshire's franchise tax as applied to electric utilities. The Franchise Tax as applied to electric utilities was eliminated by H.B. 64, Chapter 354:3 entitled "Franchise Tax; Public Utility Redefined," and not by any provision of the Nuclear Property Tax. Admitted as to the remaining allegations.

Complaint ¶ 11: Public Service of New Hampshire, the primary provider of electricity for New Hampshire, has been and continues to be subject to the New Hampshire Business Profits Tax. RSA 77-A:5. Part of the legislation creating the Seabrook Tax provides a dollar for dollar credit to be applied against this unrelated Business Profits Tax.

ANSWER: Admitted, except that it is denied that Public Service of New Hampshire has for the last several years paid any Business Profits Tax to the State of New Hampshire because, as a result of the utility's poor financial health, as well as its separate deductions and credits, not including the Nuclear Property Tax credit, the utility, although nominally "subject to" the Business Profits Tax as alleged in paragraph 11, has had and will have no liability to pay any such tax. The State is without knowledge or information sufficient to form a belief as to the likelihood that Public Service Company of New Hampshire will, for reasons unrelated to the Nuclear Property Tax credit, pay the Business Profits Tax in the future. As a result, the State of New Hampshire is unable to state that Public Service Company of New Hampshire will receive the benefit from the dollar-for-dollar Nuclear Property Tax credit

against the Business Profits Tax that is enjoyed by the utilities from Connecticut and the Commonwealth of Massachusetts.

THE PURPOSE AND EFFECT OF THE SEABROOK TAX

Complaint ¶ 12: The stated legislative purpose of the Seabrook Tax is to establish nuclear station property as "a distinct class of property," based upon findings that it is "the only property in the state that generates electricity from the fission of atoms," that such generation "imposes unique responsibilities on the state," that a nuclear generating station "creates special and unique public safety requirements and burdens" and "has a unique and lasting impact on the environment which creates burdens" on the state, and that taxation of such class of property is appropriate "to help defray the public charges of government." Chapter 354:1 (H.B. 64 § 1) (RSA 83-D:1).

ANSWER: Admitted that the stated and actual legislative purposes of the Nuclear Property Tax are those described in paragraph 12 of the Complaint.

Complaint ¶ 13: Contrary to the expressed legislative finding, the Seabrook Tax is not necessary "to help defray" any governmental costs related to the presence of Seabrook Station in New Hampshire because all the specific costs attributable to nuclear generating stations, as compared to non-nuclear generating stations, with respect to environmental compliance, emergency planning, liability insurance, and decommissioning are already the responsibility of, and paid by, the owners of Seabrook Station pursuant to federal

and New Hampshire law and regulations which pre-exist and are distinct from the Seabrook Tax.

ANSWER: Denied, except that it is admitted that certain risks and costs associated with the presence of Seabrook Station in New Hampshire are the subjects of specific plans and funds administered by State and Federal authorities and that the owners of Seabrook Station make the payments required by these specific programs.

Complaint ¶ 14: The legislative history of the Seabrook Tax indicates that the actual purpose of the Seabrook Tax is to raise additional revenues for the State of New Hampshire derived almost entirely from the owners of Seabrook Station which make retail sales of electricity to out-of-state consumers, and ultimately from those consumers themselves.

ANSWER: Denied.

Complaint ¶ 15: New Hampshire utilities selling electricity to New Hampshire consumers will pay at most a *de minimis* portion of the Seabrook Tax because of the exemption from the Franchise Tax and a dollar for dollar credit against the Business Profits Tax, while the owners of Seabrook which make retail sales of electricity to out-of-state consumers will bear the full burden of the tax.

ANSWER: Denied.

Complaint ¶ 16: The State of Connecticut, directly and through its political subdivisions and instrumentalities, is a major consumer of electricity purchased

from utilities that are joint owners of Seabrook Station and subject to the Seabrook Tax.

ANSWER: The State of New Hampshire is without knowledge or information sufficient to form a belief as to the truth of the allegation in paragraph 16 of the Complaint.

Complaint ¶ 17: Virtually all of the citizens of Connecticut are consumers of electricity purchased from utilities that are joint owners of Seabrook Station and subject to the Seabrook Tax.

ANSWER: The State of New Hampshire is without knowledge or information sufficient to form a belief as to the truth of the allegation in paragraph 17 of the Complaint.

Complaint ¶ 18: The Commonwealth of Massachusetts, directly and through its political subdivisions and instrumentalities, is a major consumer of electricity purchased from utilities that are joint owners of Seabrook Station and subject to the Seabrook Tax.

ANSWER: The State of New Hampshire is without knowledge or information sufficient to form a belief as to the truth of the allegation in paragraph 18 of the Complaint.

Complaint ¶ 19: The vast majority of the citizens of the Commonwealth of Massachusetts are consumers of electricity purchased from utilities that are joint owners of Seabrook Station and subject to the Seabrook Tax.

ANSWER: The State of New Hampshire is without knowledge or information sufficient to form a belief as to the truth of the allegation in paragraph 19 of the Complaint.

> **Complaint ¶ 20:** The State of Rhode Island, directly and through its political subdivisions and instrumentalities, is a major consumer of electricity purchased, directly or indirectly, from utilities that are joint owners of Seabrook Station and subject to the Seabrook Tax.

ANSWER: The State of New Hampshire is without knowledge or information sufficient to form a belief as to the truth of the allegation in paragraph 20 of the Complaint.

> **Complaint ¶ 21**: Virtually all of the citizens of the State of Rhode Island are consumers of electricity purchased directly or indirectly from utilities that are joint owners of Seabrook Station and subject to the Seabrook Tax.

ANSWER: The State of New Hampshire is without knowledge or information sufficient to form a belief as to the truth of the allegation in paragraph 21 of the Complaint.

> **Complaint ¶ 22**: The cost of the Seabrook Tax will be passed on to customers of these utilities, including the States of Connecticut and Rhode Island and the Commonwealth of Massachusetts and their citizens as consumers of substantial amounts of electricity, in the form of higher rates, and will impose economic hardships and burdens directly on the plaintiff States and their citizens.

ANSWER: The State of New Hampshire is without knowledge or information sufficient to form a belief as to the truth of the allegation in paragraph 22 of the Complaint. Further answering, the State of New Hampshire states that, even if the utility owners of Seabrook Station make application to appropriate regulatory bodies in the States of Connecticut and Rhode Island and the Commonwealth of Massachusetts to increase rates for consumers of electricity as a result of the passage of the Nuclear Property Tax and even if such bodies approve an increase in rates, the resulting increase in rates for any consumer in such States and Commonwealth would be negligible and would not impose an economic burden or hardship on the plaintiff states or their citizens, each of whom benefits substantially from the willingness of the citizens of New Hampshire to bear the special burdens, risks and expenses associated with the presence of Seabrook Station in New Hampshire.

> **Complaint ¶ 23**: The total direct economic cost of the Seabrook Tax on plaintiff States, their instrumentalities, and their citizens is estimated to be approximately $14,000,000 during the first year of the tax and over $500,000,000 over the life of Seabrook Station.

ANSWER: Admitted that approximately 50% of the Nuclear Property Tax will be paid by utilities organized under the laws of states other than New Hampshire and that, based on an estimated $22.4 million of total annual Nuclear Property Tax payments for the first year in which the tax is applicable, such out-of-state utilities will pay approximately $11.2 million of the tax. The State of New Hampshire is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 23 of the Complaint concerning the dollar amount of Nuclear Property Tax payments during the life of Seabrook Station.

FIRST CAUSE OF ACTION

Complaint ¶ 24: The plaintiffs reallege, as though set forth in full, the allegations contained in Paragraphs 1 through 23.

ANSWER: The State of New Hampshire incorporates its answers to paragraphs 1 through 23 of the Complaint as its answers to the allegations contained in paragraph 24.

Complaint ¶ 25: The Seabrook Tax is in conflict with and repugnant to federal law and is accordingly void under the Supremacy Clause, art. VI of the United States Constitution.

ANSWER: Denied.

Complaint ¶ 26: The Seabrook Tax is a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-state manufacturers, producers, wholesalers, retailers, or consumers of that electricity. As such, the tax is in conflict with the Tax Reform Act of 1976, Pub. L. 94-455, § 212(a) 90 Stat. 1914, codified at 15 U.S.C. § 391 which provides:

> **Tax on or with respect to generation or transmission of electricity**
>
> No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.
>
> The greatly disproportionate burden borne ultimately by non-New Hampshire consumers is a discrimination which is barred by Congress under this federal law.

ANSWER: Denied,except that it is admitted that 15 U.S.C. § 391 contains the language quoted in paragraph 26 of the Complaint.

SECOND CAUSE OF ACTION

Complaint ¶ 27: Plaintiffs reallege, as though set forth in full, the allegations contained in Paragraphs 1 through 23.

ANSWER: The State of New Hampshire incorporates its answers to paragraphs 1 through 23 of the Complaint as its answers to the allegations contained in paragraph 27.

Complaint ¶ 28: The generation and sale of electricity are commercial activities in interstate commerce.

ANSWER: Admitted that the generation and sale of electricity *in interstate commerce* are "commercial activities in interstate commerce" as alleged in paragraph 28, but denied that all generation and sale of electricity takes place in or involves interstate commerce.

Complaint ¶ 29: The Seabrook Tax constitutes an unreasonable, unlawful and prohibited burden on interstate commerce, in contravention of art. 1, § 8, cl. 3 of the United States Constitution (Commerce Clause) in that:

A. The Seabrook Tax along with the concurrently enacted credits to another New Hampshire tax and the repeal of the New Hampshire Franchise Tax on electric utilities discriminates against the utilities which are part owners of Seabrook and which sell electricity at retail to non-New Hampshire customers. The burden of this tax will ultimately be borne disproportionately by non-New Hampshire consumers, and thus this tax will provide substantial and direct commercial advantage to local businesses and consumers.

B. The Seabrook Tax is not a property tax to be borne proportionately by the owners of the taxable property. Through the utilization of the credit provision for the New Hampshire Business Profits Tax and the repeal of the New Hampshire Franchise Tax on electric utilities, the Seabrook Tax is unfairly and therefore unconstitutionally apportioned.

C. The Seabrook Tax is not fairly related to the services provided by New Hampshire. The stated legislative purpose of the Seabrook Tax (RSA 83-D:1) does not justify the tax. Under New Hampshire and federal law, all of the costs of environmental compliance, emergency planning, liability insurance, and decommissioning have been accounted for by the owner-operators of the Seabrook plant. The Seabrook Tax cannot be justified for these purposes and is not fairly related to any benefits provided the taxpayer.

ANSWER: Denied.

THIRD CAUSE OF ACTION

Complaint ¶ 30: The plaintiffs reallege, as though set forth in full, the allegations contained in Paragraphs 1 through 23.

ANSWER: The State of New Hampshire incorporates its answers to paragraphs 1 through 23 of the Complaint as its answers to the allegations contained in paragraph 30.

Complaint ¶ 31: The Seabrook Tax deprives the plaintiffs and their citizens of the equal protection of the law as guaranteed under the Fourteenth Amendment to the United States Constitution.

ANSWER: Denied.

Complaint ¶ 32: There is no rational basis for the classification established by the Seabrook Tax which results in preferential tax treatment for New Hampshire electric utilities selling electricity at retail to New Hampshire customers, and benefits for New Hampshire citizens at the expense of the plaintiff States and its citizens.

ANSWER: Denied.

FOURTH CAUSE OF ACTION

Complaint ¶ 33: Plaintiffs reallege, as though set forth in full, the allegations contained in Paragraphs 1 through 23.

ANSWER: The State of New Hampshire incorporates its answers to paragraphs 1 through 23 of the Complaint as its answers to the allegations contained in paragraph 33.

> **Complaint ¶ 34**: The Seabrook Tax contravenes and violates art. IV, § 2, cl. 1 (the Privileges and Immunities Clause of the United States Constitution) which provides in pertinent part that:
>
> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

ANSWER: Denied.

> **Complaint ¶ 35**: The enactment of the Seabrook Tax, along with the elimination of the New Hampshire Franchise Tax on electric companies and allowance of any payment made pursuant to this tax as a credit against another New Hampshire tax, creates significant benefits for the citizens of New Hampshire, while treating non-New Hampshire ratepayers and citizens substantially different.

ANSWER: Denied.

FIRST AFFIRMATIVE DEFENSE

ORIGINAL JURISDICTION

This is an inappropriate case for the exercise of this Court's original jurisdiction.

SECOND AFFIRMATIVE DEFENSE

LACK OF STANDING

Plaintiffs lack standing to assert the claims set forth in the Complaint.

THIRD AFFIRMATIVE DEFENSE

FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

Plaintiffs have failed to state a claim upon which relief may be granted, because:

1. The Nuclear Property Tax is an *ad valorem* tax on property permanently located in the State of New Hampshire assessed at the same rate against each owner of the property, regardless of the state in which the owner is organized. Such a real property tax does not constitute a burden on interstate commerce or a violation of any other provision of the constitution or federal law under any of the standards applied by this Court to evaluate state taxes.

2. Plaintiffs have no constitutional right to require the State of New Hampshire to reenact a franchise tax on New Hampshire electric utilities and the elimination of this tax and the enactment of an evenhanded tax on real property located in the State is not discriminatory.

3. The credit against New Hampshire's Business Profits Tax for amounts paid under the Nuclear Property Tax is available to all of the utility owners of Seabrook Station, regardless of the state in which they are organized, and the provision for such a credit does not render the Nuclear Property Tax discriminatory. Although further inquiry into the precise effect of the credit on each utility's Business Profits Tax liability is not appropriate when assessing

the constitutionality of a statute which imposes a fairly apportioned real property tax with a nondiscriminatory credit. The actual immediate effect of the credit will be to benefit out-of-state utilities — not New Hampshire utilities — because the New Hampshire owners of Seabrook Station have not been paying Business Profits Taxes and it is unknown when, if ever, they will pay the tax in the future and, unlike the out-of-state utilities, will therefore be unable to use the Nuclear Property Credit.

4. The Nuclear Property Tax is fairly related to the services provided by New Hampshire as that standard has been applied by this Court to state taxes challenged under the commerce clause because the measure of the tax (the value of property in New Hampshire) is reasonably related to the extent of contact each of the utilities has with the State of New Hampshire. Moreover, even though the Nuclear Property Tax is a general revenue tax, rather than a user fee for some specific facility or service provided by the State — making a factual inquiry into the extent of State services provided inappropriate in this case — the presence of Seabrook Station in New Hampshire and the unique burdens, costs and risks it presents for the State would support a factual conclusion that the tax is fairly related to the services provided by, and the burdens imposed on, New Hampshire.

5. The Nuclear Property Tax is not a tax on the generation or transmission of electricity; it is not based on the amount of electricity generated or transmitted; it does not fluctuate with variations in the electrical output of the plant; it is not suspended when the plant ceases operation (as it must for refueling and other contingencies) and the provisions of 15 U.S.C. §391 are therefore inapplicable. Even if 15 U.S.C. §391 were applicable, the Nuclear Property Tax would not violate its terms because, for the reasons described in subparagraphs 1 through 3, the tax does not discriminate

against out-of-State interests.

6. Because the Nuclear Property Tax on its face and in application is a nondiscriminatory property tax, it does not violate the equal protection or privilege and immunities clauses of the United States Constitution.

THEREFORE, defendant State of New Hampshire respectfully requests that the Court dismiss the Complaint or enter judgment in its favor and against plaintiffs and award it such other relief as may be appropriate.

Respectfully submitted,

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NO. 119 ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STATE OF CONNECTICUT,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS, Plaintiffs

v.

STATE OF NEW HAMPSHIRE, Defendant

MOTION ON BEHALF OF THE CONNECTICUT OFFICE OF CONSUMER COUNSEL FOR LEAVE TO INTERVENE, FOR LEAVE TO FILE COMPLAINT, AND BRIEF IN SUPPORT OF MOTION TO INTERVENE

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STATE OF NEW HAMPSHIRE, Defendant

MOTION FOR LEAVE TO INTERVENE AS PLAINTIFFS

Pursuant to Rule 9 of the Rules of the United States Supreme Court, and Rules 24(a) and 24(b) of the Federal Rules of Civil Procedure, the Connecticut Office of Consumer Counsel ("COCC"), by its attorneys, asks leave of this Court to intervene as a party plaintiff and to

file the complaint against the State of New Hampshire submitted herewith.

As is fully set forth in the accompanying brief in support of this Motion for Leave to Intervene and File Complaint, the Connecticut Office of Consumer Counsel ("COCC") respectfully submits:

1. The COCC, the State statutorily mandated representative of Connecticut utility ratepayer interests, Connecticut General Statutes ("Conn. Gen. Stat.") Section 16-2a, moves for leave of this Court to intervene in the above-referenced action in original jurisdiction, State of Connecticut, et. al. v. State of New Hampshire. No. 119, Original.

2. That action, brought by the Attorneys General of the States of Connecticut, Massachusetts and Rhode Island, challenges the New Hampshire Nuclear Station Property Tax, 1991 N.H. Laws c.354, ("Seabrook Tax") as violative of the Supremacy, Commerce, Equal Protection and Privileges and Immunities Clauses of the United States Constitution. Plaintiffs' Brief in Support of Motion for Leave to File Complaint, ("Plaintiffs' Brief"), p.2. That action also claims the Seabrook Tax violates 15 U.S.C. Section 391, which prohibits taxes which "discriminate against out-of-state...producers...or consumers of electricity." Id.

3. As indicated in Plaintiffs' Brief:

> [B]y imposing a tax on owners of "nuclear station property" and concurrently repealing the "Franchise Tax" on gross receipts from retail sales of electricity in New Hampshire, and allowing the full amount of the tax to be credited against such owner's liability for "Business Profits Tax" (in a manner which can be expected to benefit New Hampshire consumers in a grossly disproportionate fashion, relative to out-of-state consumers), New Hampshire has effectively protected its own residents from the impact of the tax and has exported nearly the entire burden of the tax to consumers living in the neighboring plaintiff States.

Id.

4. The Plaintiffs' Motion for Leave to File Complaint and the above-quoted Plaintiffs' Brief were filed seeking the invocation of this Court's original jurisdiction on October 29, 1991. This Motion to Intervene is timely

filed, having been filed with this Court only 58 days after the Court agreed to exercise its original jurisdiction and hear the case. Order Granting Plaintiffs' Motion, January 27, 1992.

5. If allowed to stand, the Seabrook Tax will increase consumers' rates in the three plaintiff states by an additional $14 million annually, for a total of nearly half a billion dollars over the life of the facility.

Plaintiffs' Brief, p. 18.

6. The amount of the increase in Connecticut electric utility rates resulting from the Seabrook Tax has been estimated by the Connecticut Department of Public Utility Control ("DPUC"), the State Utility Regulatory Authority, as at

least $5 million per annum. Application of the Connecticut Light and Power Company for an Increase in Rates, Conn. DPUC Docket No. 90-12-03 (1991), p. 18.

7. The Plaintiffs' Brief represents that under its rate-setting policies, the Connecticut DPUC has determined that the Seabrook Tax is "unquestionably" a cost which would be included in customer rates. Plaintiffs' Brief, p. 17, n.7.

8. The COCC is the only State agency expressly mandated and authorized by statute to represent utility ratepayer interests in any and all Court proceedings affecting those interests. Thus, the COCC is uniquely best situated to represent specific ratepayer interests

in the present action before this Court. See Conn. Gen. Stat. 16-2a. Thus, the specific interests of Connecticut electric utility ratepayers will be adequately represented only if the COCC is granted intervenor status in this action.

9. Allowing the COCC's intervention will create a precedent which would allow only limited participation by other statutorily mandated advocates from the plaintiff states, because Massachusetts has not established a separate state office of utility consumer counsel. While the Plaintiff State of Massachusetts provides a similar function to that of the COCC through its Public Advocacy Bureau of the Office of the Attorney General, that

function is expressly established within the Massachusetts Office of the Attorney General. To the contrary, the COCC was expressly legislated to exist outside of the Connecticut Attorney General's office and control. The COCC is unaware of the status or authority of Rhode Island's utility consumer advocate.

10. While the Defendant may argue that the Connecticut Attorney General adequately represents the interests of all of Connecticut's citizens and interests as parens patriae, such representation is problematic. As indicated above, the Connecticut DPUC has expressly stated in a recent electric utility decision, that it will likely include the cost of the Seabrook Tax in customer rates. Application of the

Connecticut Light and Power Company for an Increase in Rates, Conn. DPUC Docket No. 90-12-03 (1991), p. 18.

11. The Connecticut Attorney General is statutorily mandated to represent the interests of the Connecticut DPUC Commissioners in this or any other legal forum. Conn. Gen. Stat. § 3-125. While the Connecticut DPUC has indicated that it intends to pass the expense of the Seabrook Tax through to Connecticut electric utility ratepayers, and the Attorney General must defend that policy decision, the COCC opposes the pass-through of the Seabrook Tax to Connecticut ratepayers, and would challenge that policy. Thus, any representation of the interests of both the Connecticut DPUC and Connecticut

utility ratepayers by the Connecticut Attorney General's sole counsel will result in the representation of conflicting interests between constituent groups of Connecticut citizens.

12. In its role as a regulatory body, the Connecticut DPUC is required to balance the interests of both utility shareholders and ratepayers. Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944). Thus, any representation of the interests of the DPUC by the Attorney General will, by necessity, include representation of the interests of the utilities, balanced against those of Connecticut utility ratepayers. The COCC contends that the statutory responsibilities of the State Attorney General under Connecticut law

compromise the Attorney General's ability to adequately represent the interests of Connecticut utility ratepayers, and that intervention of the COCC as counsel for plaintiff Connecticut electric utility ratepayers is required.

13. The Attorney General has also indicated that he is prosecuting the case on behalf of the State of Connecticut in its proprietary capacity, as "proprietor of numerous state buildings,...resulting in charges [for electricity purchases] of over $36 million dollars" on an annual basis. Plaintiffs' Brief, p. 16. The interests of individual residential utility ratepayers in Connecticut may conflict with the interests of such a large business customer of the utilities, and thus such disparate interests should

not be represented by the Connecticut Attorney General alone. As such, the interests of Connecticut residential utility ratepayers will not be adequately protected unless the COCC Motion to Intervene is granted by this Court.

WHEREFORE, the Office of Consumer Counsel for the State of Connecticut respectfully requests that this Court grant its Motion to Intervene.

Respectfully submitted,

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STATE OF NEW HAMPSHIRE, Defendant

COMPLAINT

The Connecticut Office of Consumer Counsel, as Intervenor party plaintiff, asks leave of the Court to adopt, as the Connecticut Office of Consumer Counsel's own, the complaint as filed by party plaintiff, State of Connecticut, in this civil action for declaratory and

injunctive relief against the State of New Hampshire.

Respectfully submitted,

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NO. 119 ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STATE OF CONNECTICUT,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS, Plaintiffs

v.

STATE OF NEW HAMPSHIRE, Defendant

BRIEF IN SUPPORT OF MOTION OF THE CONNECTICUT OFFICE OF CONSUMER COUNSEL FOR LEAVE TO INTERVENE AND FOR LEAVE TO FILE COMPLAINT

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BRIEF IN SUPPORT OF MOTION OF THE CONNECTICUT OFFICE OF CONSUMER COUNSEL FOR LEAVE TO INTERVENE AND FOR LEAVE TO FILE COMPLAINT

JURISDICTION

This is a suit between sovereign States, and is within the exclusive original jurisdiction of this Court under Article III, section 2, clauses 1 and 2 of the United States Constitution and 28 U.S.C. § 1251(a)(1). The Connecticut

Office of Consumer Counsel ("COCC") brings its motion pursuant to Rule 9 of the Rules of the Supreme Court and Rules 24(a) and 24(b) of the Federal Rules of Civil Procedure for leave to intervene and file a complaint in this Court.

QUESTION PRESENTED

Does the Connecticut Office of Consumer Counsel have sufficient interest in the subject matter of this suit so as to permit it to intervene as a party?

ARGUMENT

This action presents significant questions of law which are of great concern to the country in general, and more specifically, to the New England region and to Connecticut electric utility ratepayers. The matter before this Court addresses the attempt of a particular state, the State of New

Hampshire, to inequitably and discriminatorily tax out-of-state owners of a nuclear generating plant, while providing exemption from such tax to in-state owners. The tax at issue is the New Hampshire Nuclear Station Property Tax ("Seabrook Tax").[1] The parties plaintiff have, in the instant action, invoked the original jurisdiction of this Court.

By its motion, the COCC, as a statutorily-mandated representative of Connecticut utility ratepayer interests,[2] moves to intervene as a party plaintiff.

As indicated in Conn. Gen. Stat. § 16-2a, the COCC is empowered to:

> [A]ct as the advocate for consumer interests in all matters which may affect Connecticut consumers with respect to public service

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[1] N.H. Laws c. 354.

[2] Connecticut General Statutes ("Conn. Gen. Stat.") § 16-2a.

> companies. The office of consumer counsel is authorized to appear in and participate in any regulatory or judicial proceedings, federal or state, in which such interests of Connecticut consumers may be involved....

The United Illuminating Company ("UI") and The Connecticut Light and Power Company ("CL&P") are Connecticut-based "public service companies," as defined in Conn. Gen. Stat. § 16-1(4), which own a 17.5% and 4.06% interest in the Seabrook Facility, respectively. The Connecticut Department of Public Utility Control ("DPUC") has indicated that Connecticut electric utility customer rates will likely increase approximately $5 million per annum because of the additional expense accrued in the Seabrook Tax as levied upon UI and CL&P. Application of The Connecticut Light and Power Company for an Increase in Rates, Conn. DPUC Docket No. 90-12-03 (1991), p. 18.

(Excerpted and attached as Appendix "A".) Thus, under state statute, the COCC has statutory standing to represent utility consumer interests in this proceeding.

I. Intervention as of Right

As prior U.S. Supreme Court precedents indicate, the Federal Rules of Civil Procedure ("F.R.C.P.") provide guidance for determining whether a motion for intervention in an original action before the U.S. Supreme Court will be granted. Arizona v. California, 460 U.S. 605 (1983). Pursuant to F.R.C.P. 24(a)(2), anyone shall be permitted to intervene, upon timely application:

> When the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or

> impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

For the following reasons, the COCC submits that this standard has been satisfied in the instant proceeding.

The COCC clearly satisfies the first requirement, namely, "an interest relating to the property or transaction which is the subject of the action." As indicated above, the economic impact of the Seabrook Tax upon Connecticut ratepayers, as an expense passed on to them through their rates for electricity purchases, is calculated at approximately $5 million. Application of The Connecticut Light and Power Company for an Increase in Rates, Conn. DPUC Docket No. 90-12-03 (1991), p. 18. This increase in rates clearly constitutes "an interest relating to the property or

transaction which is the subject of the action." F.R.C.P. 24(a)(2).

The second criteria of F.R.C.P. 24(a)(2) is also satisfied in the instant proceeding. As indicated above, the COCC is the statutorily-mandated advocate for "consumer interests in all matters which may affect Connecticut consumers with respect to public service companies." Conn. Gen. Stat. § 16-2a. Therefore, absent representation of Connecticut utility ratepayer interests by its statutorily-mandated representative, the "disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest."

The COCC contends that the third requirement of F.R.C.P. 24(a)(2) is also satisfied, as the interests of Connecticut electric utility ratepayers are not "adequately represented by

existing parties."

The divergence of the general interests of the State, as represented by the Connecticut Attorney General ("CAG"), and the specific interests of Connecticut utility ratepayers as represented by the COCC is amply and repeatedly demonstrated in both state and federal precedents.

In upholding the State's interest, the CAG is statutorily mandated to represent state commissioners such as those comprising the decision-making authority of the Connecticut Department of Public Utility Control ("CDPUC"). Conn. Gen. Stat. § 3-125. However, the right, and necessity of the COCC to appeal from CDPUC commissioner decisions is well established and irrefutable. Conn. Gen. Stat. § 16-2a. Clearly, at the State level, the COCC has championed interests of utility ratepayers which have been contrary to those asserted in

CDPUC decisions. See, e.g., COCC v. CDPUC, CV-89-0369221S, COCC v. CDPUC, CV-90-0378940S, OCC v. CDPUC, CV 88-0092061S.

The divergence of interests promoted by the COCC and Connecticut Attorney General at the federal level was most recently demonstrated in the proceeding convened at the Federal Energy Regulatory Commission, to rule upon the proposed merger of Northeast Utilities and the Public Service Company of New Hampshire. Northeast Utilities Service Company (Re: Public Service Company of New Hampshire) FERC Docket Nos. EC-90-10-000, ER 90-143-000, ER 90-144-000, ER 90-145-000 and EL 90-9-000. In that proceeding, the CAG, apparently representing the interests of the Connecticut DPUC, recommended the approval of the merger of the two companies. Conversely, the COCC would not endorse the merger, absent

adoption of conditions which would protect CL&P ratepayers from any adverse financial impacts which could result if the merger were approved. Such conditions were neither raised nor endorsed by the CAG. The COCC was compelled to propose such conditions, as no other party to the proceeding, including the CAG, championed the interest of CL&P ratepayers by seeking to protect them from potential inequitable expenses arising from a merger they neither sought nor required.

As indicated supra, as either a party to an original action, or as parens patriae, the involvement of the CAG in the instant proceeding does not guarantee adequate protection of specific utility ratepayer interests. Such divergence of interest between the Attorney General and Consumer Counsel has also been recognized by the Connecticut Supreme Court in

upholding appeals taken by the COCC from CDPUC decisions, and defended unsuccessfully by the Connecticut Attorney General. See e.g., CL&P v. DPUC, 210 Conn. 349, 554 A.2d 1089 (1989).

With regard to the standard of proof required of parties intervening in original actions brought petitioning the original jurisdiction of this Court, it has been held that:

> An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state.
>
> New Jersey v. New York, 345, U.S. 369, 373 (1953).

In the cited case, the City of Philadelphia was not allowed intervention in an interstate water use dispute, when Pennsylvania was already a party to the

proceeding. However, that case is easily distinguished from the case at bar. In New Jersey v. New York, no showing was made of prior divergent interest between the State of Pennsylvania and City of Philadelphia with regard to the matter at hand. Conversely, the COCC has clearly indicated the inability of the CAG to adequately represent utility ratepayer interests in this field because of its requirement to also represent the adverse interests of the CDPUC. This difference, in conjunction with the COCC's statutory mandate to represent utility consumer interests, constitutes a compelling rationale for the COCC's intervention not evident in the New Jersey v. New York proceeding. (c.f. Arizona v. California, 103 U.S. 1382 (1983) (wherein, the Supreme Court allowed the intervention of an Arizona indian tribe in an action under the original jurisdiction of this

Court despite the participation of the State of Arizona as a party.)

For these reasons, the COCC submits that it should be allowed intervention as of right in this proceeding.

II. Permissive Intervention

In the event that the Court denies the COCC intervention as of right, the COCC would submit that it qualifies as an intervenor under F.R.C.P. 24(b) addressing permissive intervention. Pursuant to F.R.C.P. 24(b)(2), upon timely application, a potential intervenor may be permitted to intervene in an action "when an applicant's claim or defense and the main action have a question of law or fact in common." Clearly, the constitutional issues raised by the COCC and the other plaintiffs in this action, share a question of law or fact in common.

In this regard, the COCC raises the same claims raised by the CAG. However, as indicated in the COCC's Motion to Intervene, a divergence arises as to the adequacy of the CAG to represent both the interests of the state as a whole, as parens patriae, or as an extremely large proprietor of state buildings, and the specific interests of Connecticut utility ratepayers, especially individual residential customers.

If the Court determines that the right conferred to the COCC by Conn. Gen. Stat. § 16-2a is to be construed as conditional, it should exercise its discretion in favor of the COCC's Motion, unless it determines that the intervention would "unduly delay or prejudice the adjudication of the rights

of the original parties." F.R.C.P. 24(b)(2). Such is not the case with regard to the COCC's Motion.

The history of Rule 24(b) evidences a policy to allow intervention liberally by government agencies seeking to speak for the public interest. The 1946 amendment to the Rule, which added the second sentence, codified an earlier decision of this Court which sanctioned the intervention by a government agency which had the sole interest of settling questions of public law. See Securities and Exchange Commission v. United States Realty and Improvement Company, 310 U.S. 434 (1944). The legislative history of the amendment indicates an attempt to discourage lower courts from interpreting Rule 24(b) in an exclusionary manner:

> The amendment was added to avoid 'exclusionary constructions' where public officials seek permission to intervene, and 'the amendment

> and in fact expands the concept of "claim or defense" insofar as intervention by a government officer or agency concerned.' It is perhaps more accurate to say that it considers the governmental application with a fresh and more hospitable approach.
>
> Nuesse v. Camp, 385 F.2d. 694, 704-705 (C.A.D.C. 1967) (footnote omitted).

As further indicated in Nuesse, permissive intervention by government officials in order to advance the public interest is, therefore, an underlying policy of Rule 24(b).

> It is a living tenet of our society and not mere rhetoric that a public office is a public trust. While a public official may not intrude in a purely private controversy, permissive intervention is available when sought because an aspect of the public interest with which he is officially concerned is involved in litigation.
>
> Id., at 706.

The issue of intervention of parties is clearly an equitable one. To that end, Supreme Court Rules "make clear that the federal rules are only a guide to procedures in an original action. (citations omitted.) Arizona v. California, 460 U.S. 605 (1983). The instant proceeding provides a unique factual and legal situation, which can be distinguished from past contrary precedents, and which provides appropriately for the intervention of only the COCC as an intervenor representing plaintiff utility ratepayer interests. As indicated above, the COCC is the only statutorily mandated representative of utility consumer interests in Connecticut. Moreover, the plaintiff State of Massachusetts has not

established a separate state office of utility consumer counsel.[3] As a result, in granting the COCC's Motion for Intervention, this Court will not be "drawn into an intramural dispute" over the issues in this proceeding in Connecticut. c.f. New Jersey v. New York, 345 U.S. 369, 373 (1953).

The COCC represents that the motion presented herein is timely, having been filed only 58 days after the original petition by the Attorneys General of the States of Connecticut, Massachusetts, and Rhode Island was granted. Moreover, the

---

[3]While Massachusetts provides a similar function through its Public Advocacy Bureau of the Office of the Attorney General, that function is expressly established within the Massachusetts Office of the Attorney General. To the contrary, the COCC was expressly legislated to exist outside of the Connecticut Office of the Attorney General. The State of Rhode Island has established a utility advocate office, however, the extent of its powers is unknown to the COCC.

COCC represents that the granting of its motion would not unduly delay or prejudice the rights of the original parties. The interests of the COCC and its constituents are substantially the same as the other plaintiffs and no additional issues of law will be presented for the Court's consideration. The complaint proposed herein is identical to that which the Court has approved for filing by the present plaintiffs. The issues are well known to all parties and neither the plaintiffs nor the defendant would be unfairly surprised by the complaint. Moreover, any other action which the COCC would seek as a means of resolving these questions would most likely be stayed pending a decision in this case.

CONCLUSION

The Connecticut Office of Consumer Counsel, both in its individual capacity and on behalf of its constituent Connecticut utility ratepayers, has a demonstrable and pressing interest in the litigation pending before this Court. The allegations stated in the proposed complaint are identical to and raise common questions of law and/or fact with those presented by plaintiffs. Therefore, the Court should grant the COCC's Motion for Leave to Intervene and for Leave to File Complaint.

Respectfully submitted,

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APPENDIX A

regarding the proposed acquisition. The Company selected and assumed for purposes of its presentation that the acquisition would obtain the necessary approvals and become effective during September 1991. The expectations flowing from this assumption are contained in sundry adjustments throughout the case.

When this case started, the projected "benefits" to Connecticut ratepayers of the takeover were over 20 million dollars. During the pendency of this case, those benefits had declined by almost two-thirds. CL&P asserts that because ratepayers can still anticipate some benefits they should pay the acquisition costs.

The proposition that the Authority should equate possible benefits flowing from the proposed merger with acquisition costs is wrong. Possible acquisition benefits must be evaluated against possible acquisition risks. In the instant case, only the benefit side of the equation was explored in depth and as we have seen and already noted, these benefits are transient and volatile. The equitable risks associated with the acquisition will be fully explored in Docket No. 90-01-01. Indeed, the Company's own witness indicated that the post acquisition capital structure of the NU holding company will be very highly leveraged; therefore, at least for a period of time, more risky because of the merger. Whether or not possible benefits outweigh possible risks will be decided in that docket. The only question we need resolve here is the allocation of

the aforementioned acquisition cost. This is separate and distinct from benefits and risks and must be evaluated independently.

We resolve it by not permitting one penny of these costs to be charged to Connecticut ratepayers. To assert that CL&P ratepayers should pay the acquisition costs incurred in bailing PSNH out of bankruptcy is an affront. The white knight is being charged for the privilege of rescuing the damsel; the lifeguard is billed for saving the floundering swimmer.* We reduce pro forma expense by $7,684,000.

In its written exceptions, the Company again claims that it is entitled to recover $2,813,000 associated with the Department's investigation of this merger in Docket No. 90-01-01. To that claim we again respond "... not ... one penny of these costs (will be) charged to Connecticut ratepayers."

---

*The suggestion that Connecticut ratepayers pay for the privilege of assisting New Hampshire is made even more irksome by the enactment of New Hampshire public law, HB-FN-A, codified at Chapter 83-D of New Hampshire Revised Statutes Annotated, wherein New Hampshire has enacted a lasso tax whose loop only captures out of state Seabrook Station owners. This tax, if not overturned, would cost Connecticut ratepayers almost 5 million dollars per annum.

Supreme Court, U.S.
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Plaintiffs,

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STATE OF NEW HAMPSHIRE,

Defendant.

RESPONSE BY THE STATE OF NEW HAMPSHIRE TO THE MOTION OF THE CONNECTICUT OFFICE OF CONSUMER COUNSEL FOR LEAVE TO INTERVENE AND FOR LEAVE TO FILE A COMPLAINT

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April 9, 1992

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IN THE

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OCTOBER TERM, 1991

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RESPONSE BY THE STATE OF NEW HAMPSHIRE TO THE MOTION OF THE CONNECTICUT OFFICE OF CONSUMER COUNSEL FOR LEAVE TO INTERVENE AND FOR LEAVE TO FILE A COMPLAINT

Pursuant to Rule 21.4 of the Rules of the United States Supreme Court, the State of New Hampshire, by its attorneys, opposes the Motion of the Connecticut Office of Consumer Counsel for Leave to Intervene and for Leave to File a Complaint in this action. The motion should be denied because the proposed intervenors do not satisfy the standards for intervention in an original action brought by states in their *parens patriae* capacities. Whatever interest the citizens of Connecticut may have in this challenge to the Nuclear Property Tax paid by the owners of Seabrook is already represented by the State of Connecticut. Intervention by the Connecticut Office of Consumer Counsel would result in the type of duplicative representation this Court has heretofore declined to permit.

There is No Compelling Interest Justifying Intervention

Ordinary standards for intervention do not apply to cases invoking the original jurisdiction of this Court by states in their role as *parens patriae*. The need for a particularly restrictive approach toward intervention to *parens patriae* cases has been clear since this Court's decision in *New Jersey v. New York*, 345 U.S. 369 (1953). There the Court denied the City of Philadelphia's motion to intervene to assert its interest in a dispute over distribution of water from the Delaware River. The State of Pennsylvania was already a party to the case in its *parens patriae* capacity. In denying intervention, the Court stated:

> **An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state.**

345 U.S. at 373.

The restrictive intervention test established in *New Jersey* continues as a sound and practical limitation on the number of parties who may speak for the interests of citizens of a state. The rule was cited with approval in *United States v. Nevada*, 412 U.S. 534 (1973) - another water rights dispute - in which the Court noted that individual users of water "ordinarily would have no right to intervene in an original action in this Court."

The District of Columbia Circuit described the reasons for imposing more restrictive intervention requirements in cases of this type in *Environmental Defense Fund, Inc. v. Higginson*, 631 F.2d 738 (D.C. Cir. 1979). There the court noted that, in original jurisdiction cases,

> **the Supreme Court has held . . . that the test for intervention becomes more stringent when the applicant for intervention is a subdivision or citizen of a state and the state is already a party to the suit.**

631 F.2d at 739.

The Court referred to the strong interests in restricting intervention in original jurisdiction cases "so as to prevent those cases from becoming time-consuming, multi-party litigation." 631 F.2d at 740.

The rigorous test for intervention in an original *parens patriae* case in this Court bars the Connecticut Office of Consumer Counsel from intervening in this case.

The Intervenor's Effort to Distinguish the New Jersey Case is Unavailing

The Connecticut Office of Consumer Counsel acknowledges the "compelling interest" test of *New Jersey v. New York*, 345 U.S. 369 (1953), but seeks to avoid it on the ground that, in *New Jersey*, there was no showing of a prior "divergent interest" between the State of Pennsylvania and the City of Philadelphia with regard to the matter at hand. Intervenor's Brief at 12. The Connecticut Office of Consumer Counsel argues that, in contrast, its interests and those of the Connecticut Attorney General are and have been divergent.

The effort to distinguish *New Jersey* fails for two reasons. First, contrary to the suggestion of the Connecticut Office of Consumer Counsel, the City of Philadelphia clearly had interests which diverged from those of the State of Pennsylvania and the Supreme Court acknowledged that divergence.

The City of Philadelphia represents only a part of the citizens of Pennsylvania who reside in the watershed area of the Deleware River and its tributaries and depend upon those waters.

345 U.S. at 373.

The Court assumed the existence of numerous divergent interests within the state, but declined "to evaluate all the separate interests within Pennsylvania" while seeking to resolve a controversy between states.

Second, whatever divergence of interests may exist between the Connecticut Attorney General and the Office of Consumer Counsel is irrelevant because, with respect to the only issue that will be decided in this case, there is no divergence. The issue raised by Plaintiffs Connecticut, Massachusetts and Rhode Island is the constitutionality of New Hampshire's Nuclear Property Tax. The Connecticut Office of Consumer Counsel proposes to adopt the pleading already filed by the Plaintiffs. It would contend that the Nuclear Property Tax is unconstitutional for the same reasons that the State of Connecticut and the other Plaintiffs contend that it is. The interests of the State of Connecticut and the Connecticut Office of Consumer Counsel with respect to that issue are identical. They do not need separate representation.

The "compelling" divergent interest alleged by the Connecticut Office of Consumer Counsel to justify intervention, in fact, concerns an issue that is not raised in this case. That issue is whether, if the Nuclear Property Tax is upheld, the Connecticut Department of Public Utility Control should permit the Nuclear Property Tax to be "passed through" to Connecticut consumers of electricity through increased rates. This is an issue that will be resolved at the State level in a separate rate proceeding in which the Office of Consumer Counsel will have an opportunity to express its views in opposition to such pass through. This Court will not be resolving local ratemaking questions and no such issues have been raised in the states' pleadings.[1]

---

[1] To the extent that ratemaking questions have anything to do with this case, they relate to the propriety of this Court exercising original jurisdiction in the first place. This is because the standing of the Plaintiff states to maintain this action as *parens patriae* depends upon their assumption that the Nuclear Property Tax will be "passed through" to consumers in the form of higher rates. The Connecticut Office of Consumer Counsel asserts that the tax has not been passed through to Connecticut consumers and that the Consumer Counsel will vigorously oppose any such pass through before the appropriate Connecticut regulatory authority. If the Consumer Counsel's position prevails, the basis on which the State of Connecticut has sought to have this Court exercise its original jurisdiction will evaporate. Thus, instead of justifying intervention, the Consumer Counsel's motion provides further support for the view, previously expressed by New Hampshire in its Opposition to Plaintiffs' Motion for Leave to File the Complaint, that this is an inappropriate case for the exercise of the Court's original jurisdiction.

Conclusion

For these reasons, the State of New Hampshire respectfully requests that the Motion of the Connecticut Office of Consumer Counsel for Leave to Intervene and for Leave to File a Complaint in this case be denied.

Respectfully submitted,

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Plaintiffs,
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Defendant.

MOTION FOR LEAVE TO INTERVENE, BRIEF IN SUPPORT OF MOTION TO INTERVENE, AND COMPLAINT OF INTERVENORS

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IN THE

Supreme Court of the United States

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STATE OF CONNECTICUT, *et al.*,
Plaintiffs,

v.

STATE OF NEW HAMPSHIRE,
Defendant.

MOTION FOR LEAVE TO INTERVENE

The United Illuminating Company, New England Power Company, The Connecticut Light & Power Company, Canal Electric Company, Montaup Electric Company, and Taunton Municipal Lighting Plant, respectfully move this Court for leave to intervene as plaintiffs in this action, pursuant to Rule 9(2) of the Rules of this Court and Rule 24 of the Federal Rules of Civil Procedure, and to file the accompanying Complaint.[1]

Respectfully submitted,

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---

[1] Pursuant to Sup. Ct. R. 29.1, we note that the parent companies of Intervenors are reflected in paragraph 4 of the Complaint. United Illuminating, New England Power, Connecticut Light & Power, and Montaup Electric own partial interests in one or more of the following companies: Yankee Atomic Electric Co., Vermont Yankee Nuclear Power Corp., Maine Yankee Atomic Power Co., and Connecticut Yankee Atomic Power Co.

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Statutory Materials

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Other Materials

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 119 Original

STATE OF CONNECTICUT, *et al.*,
Plaintiffs,

v.

STATE OF NEW HAMPSHIRE,
Defendant.

BRIEF IN SUPPORT OF MOTION TO INTERVENE

STATEMENT

This case involves a challenge by three States—Connecticut, Massachusetts, and Rhode Island—to the validity of various tax statutes enacted by the State of New Hampshire. The States invoked the original jurisdiction of this Court for their challenge, and, on January 27, 1992, this Court granted the States leave to file their complaint. 112 S. Ct. 962 (1992).

Plaintiffs' challenge focuses upon changes made to the New Hampshire tax code in 1991. At that time, New Hampshire enacted a new *ad valorem* tax on Nuclear Station property.[1] *See* 1991 N.H. Laws c. 354 (to be codified as N.H. Rev. Stat. Ann. ("RSA") Chapter 83-D.) It is undisputed by the parties that there is but one Nu-

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[1] The rate of the tax is .64 percent of assessed valuation. Nuclear Station property is assessed annually as of April 1.

clear Station property in New Hampshire: the Seabrook Nuclear Station. *See* Plaintiffs' Complaint, ¶ 6, at 5; Answer at 4. The tax thus, in both purpose and effect, is one levied solely against the Seabrook Station.[2]

The Seabrook Tax is directly linked, by means of a credit provision, to a second New Hampshire tax: the business profits tax. In the same Act that first imposed the Seabrook Tax, the New Hampshire legislature provided that any payments of the Seabrook Tax could be credited, dollar for dollar, against payments of the New Hampshire business profits tax. *See* 1991 N.H. Laws c. 354:2 (amending RSA 77-A:5). As a result, any business that pays the Seabrook Tax and has sufficient business in New Hampshire to use the full amount of the credit is assured of paying only one tax on the combined activities of owning nuclear property and earning business profits (until the credit is exhausted). A business that pays the Seabrook Tax but has insufficient business in New Hampshire to use the full amount of the credit has no such assurance.

The Act imposing the Seabrook Tax had a third effect addressed in plaintiffs' complaint: it made the New Hampshire franchise tax inapplicable to electric utilities. *See* 1991 N.H. Laws c. 354:3 and 4 (amending RSA 83-C:1 (II), (IV)). Prior to the effective date of the Act, New Hampshire electric utilities paid a franchise tax of one percent of their gross receipts, as defined by the statute.[3] *See* RSA 83-C:1. The tax was not imposed, however, on "receipts from the sale of gas or electricity for use outside of New Hampshire." *See* RSA 77-A:5. The State thus eliminated an old tax (the Franchise Tax), borne by in-state electric utilities and their customers,

[2] In their complaint and other papers, plaintiffs have referred to the tax by the shorthand designation "the Seabrook Tax." Intervenors will use the same designation.

[3] Payments of the franchise tax were allowed as a credit against the New Hampshire Business Profits tax.

and created a new tax (the Seabrook Tax), borne in large measure by out-of-state electric utilities and their customers.

Intervenors are electric utilities that, collectively, own approximately 38% of the Seabrook Station. *See* Intervenors' Complaint, ¶ 4. As owners, they are directly responsible for payment of the Seabrook Tax.[4] However, because each of the Intervenors does the vast majority of its business with customers outside of New Hampshire, none is able fully to protect itself against the dual burden of the Seabrook Tax and a tax on its business profits, as it would be able to do (up to the amount of the credit) if it conducted business solely in New Hampshire.

Intervenors believe that the scheme of taxation imposed by New Hampshire violates both the Constitution and federal law. As taxpayers, they have a direct, immediate, protectable interest in the outcome of this case. Intervenors seek intervention to assure that this interest is fully represented and protected.

REASONS FOR GRANTING INTERVENTION

The basis of intervention is simple and straightforward. The tax at the center of this case, the Seabrook Tax, is imposed directly on Intervenors, and the decision of this Court will finally determine whether New Hampshire may continue to enforce the challenged tax scheme or not. Intervenors' interest as taxpayers is not presently represented in the case.

This Court has noted that "it is not unusual to permit intervention of private parties in original actions." *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981) (citing *Oklahoma v. Texas*, 258 U.S. 574 (1922)). In

[4] Each owner is liable for the Seabrook Tax in the proportion that its ownership interest bears to the total ownership. Intervenors, therefore, are responsible for approximately 38% of the Seabrook Tax.

Maryland v. Louisiana, while permitting intervention by taxpayers subject to the challenged tax, the Court noted that the taxpayers "ha[d] a direct stake in th[e] controversy" and that the granting of their motion to intervene would advance "the interest of a full exposition of the issues." *Id.* Intervenors, too, have a "direct stake" in the outcome of this case, and their intervention will assure "a full exposition of the issues."

Although this Court has no rule specifically governing motions for intervention in original cases, its rules provide that the Federal Rules of Civil Procedure, "when their application is appropriate, may be taken as a guide to procedure in an original action in this Court." Sup. Ct. R. 17.2. Rule 24 of the Federal Rules of Civil Procedure, in turn, provides for intervention as of right (Rule 24(a)) and permissive intervention (Rule 24(b)). As discussed below, Intervenors submit that their request for intervention may be granted under either provision.

I. *Intervenors Meet the Standards for Intervention as of Right.* To be entitled to intervention as of right, a proposed intervenor must demonstrate, *first*, that it "claims an interest relating to the property or transaction which is the subject of the action"; *second*, that it is "so situated that the disposition of the action may as a practical matter impair or impede [its] ability to protect that interest"; and, *third*, that the interest to be protected is not "adequately represented by existing parties." Fed. R. Civ. P. 24(a).[5] Those requirements are met here.

To begin with, as previously noted, Intervenors have the most direct possible stake in the constitutionality of

[5] "(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Fed. R. Civ. P. 24(a).

the New Hampshire tax scheme: they pay the Seabrook Tax. Moreover, because their business activities are primarily conducted outside the State of New Hampshire, they do not have the assurance, available to Seabrook owners conducting business primarily within New Hampshire, that they will be protected against duplicative taxation of their nuclear property and their business profits. If the New Hampshire tax scheme is unlawful, as Intervenors believe that it is, then Intervenors may benefit from an overall reduction in their tax burden.[6]

This interest is not diminished by the fact that payments of the Seabrook Tax may be recovered through an increase in rates. In fact, New Hampshire has put into question whether taxes will be passed on, Answer at 13, and a proposed intervenor, Connecticut Office of Consumer Counsel, says that it will oppose recovery of the taxes through increased rates. *See* Connecticut Office of Consumer Counsel's Motion for Leave to Intervene as Plaintiff, ¶ 11. Quite plainly, if any of the tax burden is not passed through to consumers, then Intervenors will have to bear that burden themselves. But, even if all the burden is passed through, Intervenors will nevertheless suffer the economic effects of higher charges for their product. Either way, Intervenors have a concrete interest in the outcome of the case. *See also* 7C C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1908, at 285 (1986) ("in cases challenging various statutory schemes as unconstitutional . . . the courts have recognized that the interests of those who are governed by those schemes are sufficient to support intervention").

Intervenors' interests will also be decisively affected by the "disposition of this action." The decision of this

[6] We note that Intervenors have standing to challenge the New Hampshire tax scheme regardless of the possible means that New Hampshire might use to bring its system into compliance with the Constitution. *See Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 7-8 (1989); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227 (1987).

Court will determine, once and for all, whether New Hampshire may employ the tax scheme that it has chosen. Lower federal courts have recognized that the effects of *stare decisis* may create a practical disadvantage sufficient to support intervention as of right. *See Chiles v. Thornburgh*, 865 F.2d 1197 (11th Cir. 1989); *United States v. Oregon*, 839 F.2d 635 (9th Cir. 1988). This conclusion would seem to apply with even greater force when the decision having *stare decisis* effect is one by this Court resolving the very issues that Intervenors seek to raise.

It is theoretically possible, of course, that, were Intervenors to bring suit in another forum, this Court might render a decision in that case before handing down a decision in the present one. But that possibility should not defeat intervention here for several reasons. First, it is highly unlikely that another case would proceed that rapidly. If it did not, then Intervenors (as well as the defendant) would simply have been put to a duplicative, and ultimately pointless, proceeding, the outcome of which is controlled by the decision in this case. And, in any event, there is no sound reason to force Intervenors into a second round of litigation in order to raise issues already pending before this Court. It would seem preferable to have the issues fully addressed at one time, by all interested parties, and in a single forum.[7]

Finally, Intervenors do not believe that their interest as taxpayers is now represented in the case. Although Intervenors accept that the plaintiff States have mounted a vigorous challenge to the New Hampshire taxes, the fact remains that their interest, as consumers, exists only to the extent that the Seabrook Tax is passed on. To the extent that any part of the tax must be absorbed

[7] The plaintiff States, as noted in their original papers, do not have ready access to another forum in which to raise their claims. *See* Plaintiffs' Brief in Support of Motion for Leave to File Complaint at 22-23 & n.17.

by Intervenors, or to the extent that Intervenors suffer economic effects resulting from higher rates, the States have asserted no particular stake in the outcome. Those interests can be represented only by Intervenors themselves.

Intervenors do not suggest that their interests with respect to the taxation by New Hampshire are antagonistic to the interests of the plaintiff States, just different. But, in circumstances like these, that should be enough. As Professors Wright, Miller, and Kane note in their treatise, "since the rule is satisfied if there is a serious possibility that the representation will be inadequate, all reasonable doubts should be resolved in favor of allowing the absentee, who has an interest different from that of any existing party, to intervene so that he may be heard in his own behalf." 7C C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1909, at 346 (1986). That course is entirely appropriate here.

II. *Intervenors Meet the Standards for Permissive Intervention.* Intervention may also be granted "when an applicant's claim or defense and the main action have a question of law or fact in common." Fed. R. Civ. P. 24(b).[8] Here, of course, the questions of law and fact are highly similar. Plaintiffs and Intervenors both contend that the New Hampshire taxation scheme violates

[8] "(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Fed. R. Civ. P. 24(b).

the Constitution and federal law, and the factual grounds for their attack, while not fully identical, are overlapping.[9]

Rule 24(b) further states that "[i]n exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties," but there should be no serious concern about undue delay or prejudice here. Intervenors' motion comes only a short time after the filing of defendant's answer, and Intervenors' complaint does not seek to enlarge or complicate the issues presented. Moreover, if permitted to intervene, Intervenors would expect to coordinate any factual or legal presentations with plaintiffs to avoid unnecessary duplication.

It seems likely, in fact, that the presence of Intervenors, like the presence of intervenors in *Maryland v. Louisiana*, *supra*, will assist in a "full exposition of the issues." Although Intervenors do not think that the claims here will necessarily require extensive factual development, it is nonetheless the case that, if facts about the precise effects of the New Hampshire taxation scheme are deemed important, many of those facts lie most readily within the knowledge of Intervenors, rather than the existing parties. It is, after all, through discriminatory taxation *of Intervenors* that New Hampshire is able to threaten the interest of consumers that plaintiffs represent, and Intervenors most effectively can marshal any facts needed to demonstrate the nature and extent of the discrimination.

Intervention, as previously noted (*supra* p. 6), will also advance the interests in judicial economy as a whole. Given the fact that this case almost surely will decide the lawfulness of the New Hampshire taxation scheme, it

[9] As consumers, plaintiffs address the effects of the New Hampshire taxation scheme as it is reflected in rates charged by Intervenors. For their part, Intervenors address the effects of the taxation scheme on them as taxpayers. *See supra* pp. 3-7.

simply makes sense to allow all vitally interested parties to present their legal and factual arguments with respect to that scheme. Plaintiffs have properly invoked the original jurisdiction of this Court, and the Court should allow Intervenors to present their claims before this Court as well.

CONCLUSION

The motion for leave to intervene should be granted.

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IN THE

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OCTOBER TERM, 1991

No. 119 Original

STATE OF CONNECTICUT, *et al.*,
Plaintiffs,

v.

STATE OF NEW HAMPSHIRE,
Defendant.

COMPLAINT OF INTERVENORS

The United Illuminating Company, New England Power Company, The Connecticut Light & Power Company, Canal Electric Company, Montaup Electric Company, and Taunton Municipal Lighting Plant, complain and allege as follows:

JURISDICTION AND STANDING

1. The jurisdiction of this Court is based upon art. III, § 2, cl. 1 and 2 of the United States Constitution and 28 U.S.C. § 1251(a)(1) (1991).

2. The original complaint filed by plaintiffs seeks a declaratory judgment, pursuant to 28 U.S.C. § 2201 (1991), that the New Hampshire "Tax on Nuclear Station Property," 1991 N.H. Laws c. 354 (to be codified as N.H. Rev. Stat. Ann. ("RSA"), Chapter 83-D) (the "Seabrook Tax"), violates the rights and protections af-

forded to plaintiffs by the United States Constitution under art. VI, cl. 2 (Supremacy Clause); art. I, § 8 (Commerce Clause); the Equal Protection Clause of the Fourteenth Amendment; and art. IV, § 2 cl. 1 (Privileges and Immunities Clause); it also seeks to enjoin enforcement of the tax.

3. The Seabrook Nuclear Station, located in Seabrook, New Hampshire, is a facility used for the generation and transmission of electricity in interstate and intrastate commerce.

4. Intervenors are owners of the Seabrook Nuclear Station, and are liable for payment of taxes pursuant to the provisions of the Seabrook Tax. The individual intervenors, and their respective ownership interests in the Seabrook Nuclear Station, are as follows:

a. The United Illuminating Company is a Connecticut corporation with its principal place of business in New Haven, Connecticut. The United Illuminating Company owns and leases an aggregate 17.50% interest in the Seabrook Nuclear Station.

b. New England Power Company ("NEP"), a wholly owned subsidiary of New England Electric System ("NEES"), is a Massachusetts corporation with a principal place of business in Massachusetts. NEP owns an undivided 9.9% common interest in the Seabrook Nuclear Station. It sells power wholesale to two other wholly owned subsidiaries of NEES, Massachusetts Electric Company and Narragansett Electric Company, passing on to them the costs of the Seabrook Tax.

c. The Connecticut Light and Power Company, a wholly owned subsidiary of Northeast Utilities, is a Connecticut corporation with its principal place of business in Berlin, Connecticut. The Connecticut Light and Power Company owns 4.05985% of the Seabrook Nuclear Station.

d. Canal Electric Company, a wholly owned subsidiary of Commonwealth Energy System ("CES"), is a Massachusetts Business Trust with its principal place of business in Cambridge, Massachusetts. Canal Electric Company owns a 3.52% interest in the Seabrook Nuclear Station. It sells power wholesale to two other wholly owned subsidiaries of CES, Cambridge Electric Light Company and Commonwealth Electric Company, passing on the costs of the Seabrook Tax.

e. Montaup Electric Company is a wholly owned subsidiary of Eastern Edison Company ("EEC"), which, in turn, is a wholly owned subsidiary of Eastern Utilities Associates ("EUA"), with its principal place of business in Boston, Massachusetts. Montaup Electric Company owns 2.89% of the Seabrook Nuclear Station. It sells power wholesale to EEC and another wholly owned subsidiary of EUA, Blackstone Valley Electric Company, passing on the costs of the Seabrook Tax.

f. Taunton Municipal Lighting Power Plant is a quasi-autonomous department of the City of Taunton, a municipal corporation situated in Bristol County, Massachusetts. Taunton Municipal Lighting Plant owns 0.10034% of Seabrook Nuclear Station.

5. The defendant is the State of New Hampshire.

THE NEW HAMPSHIRE TAXATION SCHEME

6. The Seabrook Tax imposes an *ad valorem* tax upon the value of nuclear station property at the rate of 0.64 percent of valuation. Chapter 354:1 (H.B. 64, § 1) to be codified as RSA 83-D:1. Each of the intervenors is liable for the tax in proportion to its share of the ownership of the Seabrook Nuclear Station.

7. The Seabrook Tax is linked to a second New Hampshire tax, the New Hampshire Business Profits Tax, by virtue of a credit provision. Pursuant to Chapter 354:2 (H.B. 64, § 2), amending RSA 77-A:5, payment of the Seabrook Tax entitles the taxpayer to a dollar-for-dollar credit against tax on its business profits, but only to the

extent that the business profits are attributable to business done in New Hampshire.

8. At the same time that New Hampshire enacted the Seabrook Tax, and provided for credit of that tax against the New Hampshire Business Profits Tax, it amended the New Hampshire Franchise Tax to exclude electric utilities from the definition of "public utility" and to exclude sales of electricity from the coverage of that tax. Chapter 354:3 and 4 (H.B. 64, §§ 3 and 4), amending RSA 83-C:1 (II), (IV).

9. The New Hampshire taxation scheme is further discussed at paragraphs 5 through 23 of plaintiffs' complaint. The allegations of those paragraphs are incorporated herein by reference.

FIRST CAUSE OF ACTION

10. Intervenors reallege, as though set forth in full, the allegations contained in paragraphs 1 through 9.

11. The operation of the New Hampshire taxation scheme constitutes a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity.

12. The operation of the New Hampshire taxation scheme directly and indirectly results in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

13. The operation of the New Hampshire taxation scheme is in conflict with the provisions of 15 U.S.C. § 391, which prohibit discriminatory taxation on or with respect to the generation or transmission of electricity, and the Supremacy Clause, art. VI of the United States Constitution.

SECOND CAUSE OF ACTION

14. Intervenors reallege, as though set forth in full, the allegations contained in paragraphs 1 through 12.

15. The operation of the New Hampshire taxation scheme results in discriminatory taxation of businesses like intervenors that have ownership interests in the Seabrook Nuclear Station but do not conduct sufficient business activities in New Hampshire to be eligible for full use of the credit provided by Chapter 354:2 (H.B. 64, § 2), amending RSA 77-A:5, against tax on their business profits.

16. The operation of the New Hampshire taxation scheme is not fairly apportioned in that it exposes businesses like intervenors doing business in interstate commerce to the risk of multiple taxation on its ownership of the Seabrook Nuclear Station and on its business profits but protects businesses doing business solely in intrastate commerce from the risk of such multiple taxation.

17. The burdens of the New Hampshire taxation scheme are not fairly related to the services provided by New Hampshire.

18. The operation of the New Hampshire taxation scheme constitutes an impermissible burden on interstate commerce, in violation of art. I, § 8, cl. 3, of the United States Constitution (Commerce Clause).

THIRD CAUSE OF ACTION

19. The plaintiffs reallege, as though set forth in full, the allegations contained in paragraphs 1 through 12.

20. The operation of the New Hampshire taxation scheme, without legitimate or rational basis, imposes unequal and discriminatory tax burdens on businesses like intervenors that have ownership interests in the Seabrook Nuclear Station but do not conduct sufficient business activities in New Hampshire to be eligible for full use of the credit provided by Chapter 354:2 (H.B. 64, § 2), amending RSA 77-A:5, against tax on their business profits.

21. The operation of the New Hampshire taxation scheme deprives intervenors of the equal protection of the laws guaranteed under the Fourteenth Amendment to the United States Constitution.

WHEREFORE, intervenors respectfully request that this Court:

(A) Declare, pursuant to 28 U.S.C. § 2201 (1991), that the operation of the New Hampshire taxation scheme is contray to the United States Constitution and the laws of the United States;

(B) Issue a permanent injunction prohibiting the defendant, its agents and employees from enforcing the New Hampshire taxation scheme;

(C) Grant intervenors their costs and such other relief as the Court may deem just and proper.

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No. 119, Original

IN THE

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OCTOBER TERM, 1991

STATE OF CONNECTICUT
COMMONWEALTH OF MASSACHUSETTS,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATION,

Plaintiffs,

v.

STATE OF NEW HAMPSHIRE,

Defendant.

RESPONSE BY THE STATE OF NEW HAMPSHIRE TO THE MOTION OF CERTAIN ELECTRIC UTILITIES FOR LEAVE TO INTERVENE AND LEAVE TO FILE A COMPLAINT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

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STATE OF CONNECTICUT,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATION,

Plaintiffs,

v.

STATE OF NEW HAMPSHIRE,

Defendant.

RESPONSE BY THE STATE OF NEW HAMPSHIRE TO THE MOTION OF CERTAIN ELECTRIC UTILITIES FOR LEAVE TO INTERVENE AND LEAVE TO FILE A COMPLAINT

Pursuant to Rule 21.4 of the Rules of the United States Supreme Court, the State of New Hampshire, by its attorneys, opposes the Motion of the United Illuminating Company, New England Power Company, Connecticut Light & Power Company, Canal Electric Company, Montaup Electric Company and Taunton Municipal Lighting Plant (collectively "the Utilities") for Leave to Intervene and for Leave to File a Complaint in this action.

The Utilities' motion raises a fundamental question about the nature of this case and the real parties in interest. If the burden of the tax falls upon the Utilities, as they assert, they are the proper plaintiffs to challenge the Nuclear Property Tax and this is not a controversy between two or more states

over which this Court should exercise original jurisdiction. If the burden of the tax falls upon Plaintiffs' citizens, and this Court allows the States to proceed as *parens patriae*, they are the proper and exclusive representatives of their citizens and the Utilities are no more entitled to intervene than any other party who seeks to raise a separate voice on behalf of these citizens.

The Utilities are correct that they are the taxpayers subject to the tax and that the States and their citizens are merely customers who will only pay the tax if the utility regulatory agencies permit the tax to be passed through in rates. That being the case, the States, in seeking original jurisdiction of the Court, were acting on behalf of the Utilities, rather than as *parens patriae*, which is not an appropriate basis for the Court to exercise original jurisdiction.

If The Utilities' Bear The Burden Of The Tax, This Case Is Not Properly Before This Court On Original Jurisdiction

If the burden of the tax falls upon the Utilities, then this is not the Plaintiffs' case, and the exercise of original jurisdiction is inappropriate. In arguing for original jurisdiction, Plaintiffs contended that the Nuclear Property Tax was "recoverable from the ultimate consumers of electricity, including the Plaintiffs in the form of increased rates" and therefore Plaintiffs had standing to bring this case on the consumers' behalf. (Plaintiffs' Brief in Support of Motion for Leave to File Complaint at 17). The Utilities' Brief argues that the Plaintiffs do not have such a direct interest in this suit. Rather, the Utilities claim that it is they, rather than the States, that are "directly responsible for payment of the Seabrook Tax" and that "they have the most direct possible stake" in the constitutionality of the tax. (Utilities' Br. at 3-4). Thus, the Utilities confirm what New Hampshire argues in opposing original

jurisdiction initially — the Plaintiffs' interest in this litigation "exists only to the extent that the Seabrook Tax is passed on." (*Id.* at 6). To the extent costs are not passed through, the Utilities properly note, "the States have asserted no particular stake in the outcome" of this litigation. (*Id.* at 7).

Because it is the Utilities and not the Plaintiffs or their citizens that pay the Nuclear Property Tax and because it is not clear whether the tax will be passed through in the form of higher rates, the Plaintiffs, in suing here, are prosecuting claims that properly belong to the Utilities. The Utilities are entitled to pursue the remedies available to them to challenge the tax, but they have no right to bring an original action in this Court. The Plaintiffs' effort to initiate this litigation for the Utilities should not enlarge their choice of remedies.

Instead, because the Plaintiffs are attempting to bring the Utilities' case for them, the effort to invoke this Court's original jurisdiction should fail and the Utilities should proceed in a proper forum available to them. As this Court noted in *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976):

> **A State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens.**

See also Oklahoma ex rel Johnson v. Cook, 304 U.S. 387, 394 (1938) (A state's ability to sue as *parens patriae* "does not go so far as to permit resort to [the Supreme Court's] original jurisdiction in the name of the State but in reality for the benefit of particular individuals, albeit the State asserts an economic interest in the claims and declares their enforcement to be a matter of state policy"); *North Dakota v. Minnesota*, 263 U.S. 365 (1923) (State cannot sue for flood damage to farmers' land); *Oklahoma v. Atchinson, Topeka & Santa Fe Railroad*, 220 U.S. 277, 289 (1911) (State cannot sue to challenge freight

rates affecting railroad shippers in state); *Alabama v. Arizona*, 291 U.S. 286, 292 (1934) (original jurisdiction rejected, *inter alia*, because the State made no showing that the affected private companies could not more speedily and conveniently raise the issues at stake); XII *Moore's Federal Practice* §350.02(3) at 3-18 n.3 ("In order to properly invoke this jurisdiction, the State must bring an action on its own behalf and not on behalf of particular citizens.")

In *Arizona v. New Mexico*, 425 U.S. 794 (1976), a State attempted to sue in its proprietary capacity as a consumer of large quantities of electrical energy generated in another state and as *parens patriae* for its citizens who consumed and paid for that energy. This Court determined that the State was not properly acting as *parens patriae* and that it was inappropriate to exercise original jurisdiction. The Court noted that the utilities affected by the New Mexico tax had the right to sue to vindicate their interests and, in fact, had brought such a suit in New Mexico State Court. The utilities' suit provided an appropriate forum for litigating the issues, which the States sought to raise as an original matter. *Id.* at 797. Here, too, the Utilities have both administrative and judicial remedies available.[1] By seeking original review in this Court, the Utilities have short-circuited the appropriate review process.

If Plaintiffs' Citizens Bear The Burden Of The Tax There Is No Compelling Interest Justifying the Utilities' Intervention

If Plaintiffs' citizens bear the burden of the tax, the Utilities have no right and no reason to add their voices to the State's as advocates for the interests of the Plaintiffs' citizens. As

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[1]Two of the utilities subject to the tax have already made their payments under protest and have advised New Hampshire of their intent to seek refunds under the administrative procedure provided by RSA 83-D:10.

New Hampshire stated in its response to the Connecticut Consumer Counsel's motion to intervene, ordinary standards for intervention do not apply to cases invoking the original jurisdiction of this Court by States in their role as *parens patriae*. When the State acts as *parens patriae*, it is deemed to speak for all of its citizens, and individual citizens ordinarily have no right to separately intervene. *Kentucky v. Indiana*, 281 U.S. 163, 173 (1930); *Utah v. United States*, 394 U.S. 89, 95-96 (1969). The need for a particularly restrictive approach toward intervention in *parens patriae* cases has been clear since this Court's decision in *New Jersey v. New York*, 345 U.S. 369 (1953). There, the Court denied the City of Philadelphia's motion to intervene to assert its interest in a dispute over distribution of water from the Delaware River. The State of Pennsylvania was already a party to the case in its *parens patriae* capacity. In denying intervention, the Court stated:

> **An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state.**

345 U.S. at 373.

The restrictive intervention test established in *New Jersey* continues as a sound and practical limitation on the number of parties who may speak for the interests of citizens of a state. The rule was cited with approval in *United States v. Nevada*, 412 U.S. 534, 538 (1973) - another water rights dispute - in which the Court noted that individual users of water "ordinarily would have no right to intervene in an original action in this Court." The rule of limiting intervention in *parens patriae* cases, "prevent[s] those cases from becoming time consuming

multi-party litigation." *Environmental Defense Fund v. Higginson*, 631 F.2d 738, 740 (D.C. Ctr. 1979).[2]

Also, there is no need to admit the Utilities for discovery purposes, as they have asserted. (Utilities Br. at 8). The Utilities and the States assert that this dispute is not fact-based. If that is so, the information needed concerning the effect of the Nuclear Property Tax on the Utilities is available either through the public filings made by these regulated companies, or through the tax return filings made with New Hampshire.

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[2]The Utilities argue for a different result, citing *Maryland v. Louisiana*, 451 U.S. 725 (1981), where the Court permitted certain pipeline companies to intervene in a *parens patriae* case. New Hampshire concedes that the *Maryland v. Louisiana* Court took a liberal approach to the intervention question - an approach that departed from the restrictive rule of *New Jersey v. New York*. But special considerations present in *Maryland v. Louisiana*, and not present here, may have influenced the Court's approach. There were multiple reasons for the Court to exercise original jurisdiction in that case. First, the case involved an effort by a State to impose a severance tax on gas extracted from *federal* land, distinguishing the case from *Arizona v. New Mexico*, which "did not sufficiently implicate the unique concerns of federalism forming the basis for [the Court's] original jurisdiction." 451 U.S. at 743. Noting the important federal interests at stake, the Court allowed the United States and the Federal Energy Regulatory Commission to intervene and, having done so, then permitted the pipeline companies to intervene on their separate motion. After allowing the "federal" parties to intervene, the decision to admit the pipeline companies as well may have seemed less significant and the principle of limiting representatives in *parens patriae* cases less relevant. In addition, the tax at issue was one of unique magnitude, involving over $150 million annually, and was being passed on to consumers in over 30 states, making it "[u]nlike the day-to-day taxing measures" which the Court might otherwise decline to consider. 451 U.S. at 744. In light of the importance of the case and the separate and independent grounds for entertaining jurisdiction, it is possible that the Court concluded that an exception to the restrictive intervention standards for *parens patriae* cases was appropriate. But, whatever considerations led to the decision to allow intervention there, should not cause the Court to relax the rule of *New Jersey v. New York* in this case.

Thus, if the Plaintiffs have properly invoked the Court's original jurisdiction, there is no role for the Utilities in this case. Their pleading raises no claims or issues not being raised by the Plaintiffs, and Plaintiffs will adequately represent the interests of their consumers. Under *New Jersey v. New York*, Plaintiffs are the exclusive representatives of the interests of their consumers. The Utilities should not be permitted to speak for them as well.

CONCLUSION

For these reasons, the State of New Hampshire respectfully requests that the Motion of the United Illuminating Company, Inc., New England Power Company, Connecticut Light & Power Company, Canal Electric Company, Montaup Electric Company and Taunton Municipal Lighting Plant for Leave to Intervene and for Leave to File a Complaint be denied.

Respectfully submitted,

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No. 119 Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF CONNECTICUT, *et al.*,
Plaintiffs,

v.

STATE OF NEW HAMPSHIRE,
Defendant.

REPLY BRIEF OF UNITED ILLUMINATING CO., ET AL., IN SUPPORT OF MOTION TO INTERVENE

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REPLY BRIEF OF UNITED ILLUMINATING CO., ET AL., IN SUPPORT OF MOTION TO INTERVENE

In its response to our Motion to Intervene, New Hampshire goes back and forth on its arguments about intervention depending on its speculation about whether, and to what extent, the utilities pass on the tax to their customers. Despite their variety, none of the arguments amounts to a sound basis for opposing intervention.

1. It is hardly a ground for opposing intervention by the utilities to say that they may not be able to pass through the tax to consumers of electricity. Although the utilities expect that most or all of the tax will be passed through, the possibility of their having to absorb some tax burden is a strong reason *in favor of* their intervention. It is true, of course, that the utilities could seek redress in the New Hampshire courts, but the availability of that course, for reasons that we have stated before, should not bar the utilities from presenting their claims in a case

already pending before this Court. *See* Brief in Support of Motion to Intervene at 6. For reasons of both fairness and efficiency, intervenors should be granted the right to assert their own interests in this case.

New Hampshire does not, in fact, appear to argue that the inability to pass on the Seabrook Tax should disqualify the utilities from intervention; rather, it seems, without actually saying so, to be raising again its argument that the Court should not be exercising jurisdiction in this case.* The short answer to that notion is that the bridge has already been crossed: the Court has granted leave for the plaintiff States to file their complaint, doing so in the face of this same conjecture by New Hampshire that consumers may not ultimately be burdened by the tax. Moreover, and in any event, the utilities are not asserting that consumers will bear no substantial burden from the tax—only that, at this point, we cannot be sure that they will bear all of it. The utilities thus have a genuine interest of their own to protect.

2. Even if every penny of the tax were to be passed on to consumers, the utilities should still be permitted to intervene. As we have previously noted, the passing-on of an unconstitutional tax raises prices and depresses demand. *See* Brief in Support of Motion to Intervene at 5. The utilities' interest in avoiding adverse effects on sales —as well as resistence from regulators to other, independently justified price increases—is an interest separate from, and in addition to, the interest of consumers in avoiding higher prices.

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* In this regard, New Hampshire seeks to rely on *Arizona v. New Mexico*, 425 U.S. 794 (1976), where the Court declined to exercise original jurisdiction. But, unlike the situation there, none of the utilities in this case is a political subdivision of a plaintiff state with an already pending challenge to the tax in another forum. *See Maryland v. Louisiana*, 451 U.S. 725, 743 (1981) (distinguishing *Arizona v. New Mexico* on such grounds). Moreover, each of the utilities in this case has paid the tax, and each utility has sought, or will seek, to pass the tax on to its customers. *See id.* (same).

The cases relied on by New Hampshire—principally *New Jersey v. New York*, 345 U.S. 369 (1953)—are wholly beside the point. The utilities are not asserting a generalized interest as citizens of the plaintiff states—an interest already represented by the states in their capacity of *parens patriae*. Rather, the utilities are asserting that their own economic interests are directly affected by the imposition of the tax. It is just that sort of immediate, concrete interest for which intervention has been thought appropriate. See 7C C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, § 1908, at 285 (1986).

The utilities thus stand in essentially the same position as the pipeline companies that were permitted to intervene in *Maryland v. Louisiana*, 451 U.S. 725 (1981). Although New Hampshire speculates that a web of special factors in that case may have led this Court to make "an exception to the restrictive intervention standards for *parens patriae* cases," Response at 6 n.2, that theory is simply misguided. The pipeline companies in *Maryland v. Louisiana* were not seeking to intervene *as citizens* in order to assert an interest in common with most or all other citizens of the plaintiff states: they sought to intervene *as taxpayers* directly subject to the challenged tax. Noting that fact, the Court in *Maryland v. Louisiana* found that the pipelines "ha[d] a direct stake in th[e] controversy." 451 U.S. at 745 n.21. Intervenors—the actual taxpayers here—have precisely the same "direct stake" in the outcome of this case.

CONCLUSION

The Motion for Leave to Intervene should be granted.

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Supreme Court, U.S.
FILED
MAY 26 1992
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No. 119, Original

In The

Supreme Court of the United States

October Term, 1991

State of Connecticut,
Commonwealth of Massachusetts, and
State of Rhode Island and
Providence Plantations,

Plaintiffs,

v.

State of New Hampshire,

Defendant.

VINCENT L. McKUSICK, SPECIAL MASTER

FIRST INTERIM REPORT WITH RECOMMENDATIONS ON MOTIONS TO INTERVENE

May 26, 1992

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VINCENT L. McKUSICK, SPECIAL MASTER

FIRST INTERIM REPORT WITH RECOMMENDATIONS ON MOTIONS TO INTERVENE

May 26, 1992

I. BACKGROUND

On January 27, 1992, this Court granted the motion of the State of Connecticut, the Commonwealth of Massachusetts, and the State of Rhode Island and Providence Plantations for leave to file a complaint against the State of New Hampshire challenging the constitutionality of Chapter 354 of the 1991 Laws of New Hampshire, which created the New Hampshire Nuclear Station Property

Tax (the "Seabrook Tax"[1]) and made related changes in the New Hampshire Franchise and Business Profits Taxes. Chapter 354 classified nuclear station property as a special class of property for taxation purposes and imposed an *ad valorem* tax of 0.64 percent annually on the owners of nuclear station property located within New Hampshire. Chapter 354 also (1) repealed the New Hampshire Franchise Tax so far as it applied to electric utilities, and (2) granted utilities owning nuclear station property a credit against the New Hampshire Business Profits Tax to the extent of the Seabrook Tax paid by them.

The Seabrook Station, the one and only nuclear power station in New Hampshire, is owned in undivided percentage shares by electric utilities operating in New Hampshire and the three Plaintiff States. Public Service Company of New Hampshire owns the largest single share in the Seabrook Station, 35.6 percent. The six non-New Hampshire utilities seeking to intervene in this action own collectively about 38 percent of the Seabrook Station.

The Plaintiff States allege that "[v]irtually all" of the citizens of Connecticut and Rhode Island and the "vast majority" of the citizens of Massachusetts are consumers of electricity purchased directly or indirectly from utilities that are joint owners of the Seabrook Station. The Plaintiff States, observing that the cost of the Seabrook

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[1] The Seabrook Nuclear Station at Seabrook, New Hampshire, is the only facility subject to the property tax that is here challenged.

Tax has been or is likely to be passed on to consumers within those states, contend that the burden of the tax will fall disproportionately upon consumers in states other than New Hampshire.

Chapter 354 fixed the assessed valuation of the Seabrook Station at $3.5 billion for 1991, for a total annual tax of $22.4 million, with the first tax payment due on September 15, 1991. The Plaintiff States estimate the "total direct economic cost" of the Seabrook Tax on themselves, their instrumentalities and their citizens at about $14 million during the first year of the tax and more than $500 million over the life of the Seabrook Station.

Suing in a proprietary capacity as themselves consumers of electricity purchased from owners of the Seabrook Station, and also in a *parens patriae* capacity as representatives of the interests of their citizens, the Plaintiff States ask this Court to declare Chapter 354 unconstitutional and to enjoin the collection of the Seabrook Tax. The Plaintiff States urge that Chapter 354 offends the United States Constitution on four alternative grounds: (1) violation of the Supremacy Clause, art. VI, cl. 2, by imposition of a discriminatory tax in contravention of 15 U.S.C. § 391; (2) undue burden upon interstate commerce in violation of the Commerce Clause, art. I, § 8, cl. 3; (3) denial of equal protection of the laws guaranteed by the Fourteenth Amendment; and (4) violation of the Privileges and Immunities Clause, art. IV, § 2, cl. 1.

After the Court granted the Plaintiff States' motion for leave to file their complaint against the State of New Hampshire, two groups moved to intervene as plaintiffs. On March 27, 1992, the Connecticut Office of Consumer

Counsel filed its motion to intervene, to which New Hampshire filed a response on April 9. On April 16, six utility owners of shares of the Seabrook Station, The United Illuminating Company, New England Power Company, The Connecticut Light & Power Company, Canal Electric Company, Montaup Electric Company and Taunton Municipal Lighting Plant (the "Utilities"), filed their motion to intervene, to which New Hampshire responded on April 29. The Utilities filed a reply to New Hampshire's response on May 13.

By Order dated May 18, the Court referred the two pending motions to intervene to me as Special Master. After reviewing the pleadings and briefs and after hearing oral argument of counsel, I herewith respectfully submit my recommendations on the motions to intervene and my reasons therefor.

II. ANALYSIS

A. Motion of the Connecticut Office of Consumer Counsel to Intervene

The State of Connecticut is one of the original parties bringing this action before this Court, with its legal representation provided by its Office of Attorney General. Another agent of the State of Connecticut, its Office of Consumer Counsel, now seeks by intervention to join the State as a co-plaintiff. I can find no precedent for the requested intervention. On the constitutionality of Chapter 354 – the one and only question that will be decided in this original action – the interests of the State of Connecticut and its Office of Consumer Counsel are identical. The would-be intervenor argues that Connecticut law declares

it to be the only proper state agent for asserting the interests of electric customers and that it can do so more independently than can the Office of Attorney General; but those arguments represent merely one side of an intramural dispute within Connecticut state government, a dispute that this Court cannot undertake to resolve. I would deny the first motion to intervene.

Rule 17.2 of the Supreme Court Rules provides that the Federal Rules of Civil Procedure, "when their application is appropriate, may be taken as a guide to procedure in an original action in this Court." In navigating this unique procedural sea, however, this Court's own precedents provide the most reliable beacons. *See, e.g., Arizona v. California*, 460 U.S. 605, 614 (1983) (noting, in the context of a motion to intervene, that "our own Rules make clear that the Federal Rules are only a guide to procedures in an original action").

In *New Jersey v. New York*, 345 U.S. 369 (1953), this Court had occasion to consider a petition closely resembling that at bar. The Court rebuffed the bid of the City of Philadelphia to intervene in a water-rights dispute in which the Commonwealth of Pennsylvania already had been permitted to intervene as a party, declaring:

> An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state.

Id. at 373 (citation omitted). Imposition of this stringent standard, the Court reasoned, would serve the important

policy goals of respecting "sovereign dignity" and promoting judicial efficiency. Sovereign dignity would be undermined by the Court's involvement in "intramural dispute[s]" among competing representatives; a state "might be judicially impeached on matters of policy by its own subjects . . . ." *Id.* Judicial efficiency likewise would be threatened by the allowance of multiple representatives; "there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties." *Id.* The City of Philadelphia failed to satisfy its burden of compelling differentiation. Indeed, the Court observed, the City's counsel were "unable to point out a single concrete consideration in respect to which the Commonwealth's position does not represent Philadelphia's interests." *Id.* at 374.

The Connecticut Office of Consumer Counsel struggles to meet the *New Jersey* test, contending that it plays a unique statutory role as the sole authorized representative of Connecticut ratepayer interests in both the state and federal courts, and that the Office of Attorney General is compromised in its representation by conflicts of interest, specifically by the alleged responsibility of that office to defend the expected ruling of the Connecticut regulatory authority to pass the Seabrook Tax through to Connecticut consumers.

The would-be intervenor's attempt at differentiation, however, is even less persuasive than that of the City of Philadelphia. While the City of Philadelphia is a political subdivision of the state, the Connecticut Office of Consumer Counsel *is* the state. Moreover, on the only issue

before this Court, the positions of the Connecticut Attorney General and Consumer Counsel precisely coincide. Both urge this Court to declare Chapter 354 unconstitutional and to enjoin the collection of the Seabrook Tax. Indeed, the would-be intervenor proposes to adopt in full the State of Connecticut's complaint. Any possible divergence as to the passthrough of the Seabrook Tax is here irrelevant. This Court either will strike down the Seabrook Tax (in which event the matter of passthrough will be moot) or will uphold the Seabrook Tax (in which event the matter of passthrough will not be decided in this forum). The Office of Consumer Counsel, like the City of Philadelphia in the *New Jersey* case, fails to identify a single concrete respect in which the State of Connecticut, through its Office of Attorney General, inadequately represents consumer constituents on the constitutionality question to be decided by this Court. Neither sovereign dignity nor judicial efficiency would be served by allowing the requested duplicative representation of the identical interest.

Although I recommend that this Court deny the intervention motion of the Connecticut Office of Consumer Counsel, I have accorded it *amicus curiae* status in the proceedings before me. I believe that its *amicus* participation may be of some assistance in preparing this case for submission to the Court. I make no recommendation whether the would-be intervenor should have *amicus curiae* status before the Court after the filing of my final report.

B. Motion of the Utilities to Intervene

I come to the opposite conclusion on the Utilities' motion to intervene. I would grant their motion. As is evident on the face of their complaint, the Plaintiff States, in their *parens patriae* role, represent only electric consumers. They do not purport to represent the interests of the Utilities. Nor do the Utilities for their part seek, as did the Connecticut Office of Consumer Counsel, to don the mantle of electric consumers in a manner that would undermine the sovereign dignity of the Plaintiff States.

First, the Utilities are uniquely and directly affected as the taxpayers immediately liable for payment of the Seabrook Tax. To the extent the regulatory authorities do not allow the Utilities to pass the tax along to consumers through increased rates, the Utilities suffer an immediate injury that the Plaintiff States do not represent. Even if the regulatory authorities permit the Utilities to pass the entire tax through to consumers, they still suffer a distinct injury in that increased rates are likely to dampen demand and to raise regulatory resistance to other, independently justified rate increases. The Utilities plainly possess an interest separate and distinct from that of the electric customers who alone are represented by the three Plaintiff States in their *parens patriae* capacity. *See Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981) (the Court, noting the intervenors' "direct stake" in the action, adopted Special Master's recommendation that 17 pipeline companies directly paying Louisiana tax be permitted to intervene in *parens patriae* action prosecuted by other states on behalf of consumers paying pass-through tax).

Second, whereas considerations of judicial economy militate against allowing the Connecticut Office of Consumer Counsel to intervene, they weigh in favor of intervention by the Utilities. The Utilities possess information central to the framing of the constitutional questions. Although counsel for the parties are currently engaged in a good faith effort to stipulate to facts and documents, their agreement may well not cover the entire universe of relevant data. Should it become necessary to resort to discovery or eventually to trial of disputed facts, the presence of the Utilities as parties would facilitate access to information and expedite the submission of this case to the Court for final decision. *See, e.g.*, Fed. R. Civ. P. 33, 36 (interrogatories, requests for admission to be served upon *parties*). I am confident that as intervenors the Utilities will work cooperatively with the States to submit this case in an efficient and expeditious manner. *See Maryland v. Louisiana*, 451 U.S. at 745 n.21 (noting that participation by taxpayers as intervenors would facilitate "a full exposition of the issues").

III. CONCLUSION

For the foregoing reasons, I recommend that this Court enter the following form of Order:

This case having been submitted on the report of the Special Master dated May 26, 1992 [and the exceptions of the parties thereto],

IT IS ORDERED that the motion to intervene of the Connecticut Office of Consumer Counsel is DENIED; and

IT IS FURTHER ORDERED that the motion to intervene of The United Illuminating Company, New England Power Company, The Connecticut Light & Power Company, Canal Electric Company, Montaup Electric Company and Taunton Municipal Lighting Plant is GRANTED; and Defendant State of New Hampshire is directed to file and serve its answer to the complaint of those intervening Plaintiffs within 20 days of this Order.

Respectfully submitted,

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May 26, 1992

SUPREME COURT OF THE UNITED STATES

NO. 119, ORIGINAL

STATE OF CONNECTICUT,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,

Plaintiffs,

v.

STATE OF NEW HAMPSHIRE,

Defendant.

MOTION OF THE MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY FOR LEAVE TO PARTICIPATE AS AN AMICUS CURIAE IN THE PRESENT ACTION.

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MOTION.

The Massachusetts Municipal Wholesale Electric Company ("MMWEC") respectfully moves that the court grant it leave to participate as an amicus curiae in the present action.

GROUNDS.

Guided by the criteria of Supreme Court Rule 37 controlling participation by an appellate amicus curiae, MMWEC reports as follows.

1. (a) MMWEC is a statutorily created corporation comprised of 29 Massachusetts municipal electric departments and intended by the Massachusetts Legislature to acquire and to sell to its constituent members and other utilities electrical power at economical rates. To that end, the Legislature has authorized and enabled MMWEC to purchase electrical power and generating capacity in greater volumes and at lower costs than would be available to individual municipal electric departments; and to sell those amounts of "public power" to its members and to other utility purchasers at savings resulting from the scale of its activities.

(b) In legal character, MMWEC comprises a political subdivision of the Commonwealth created by Massachusetts Statutes 1975, Chapter 775, §§1-25, codified as Massachusetts General Laws Chapter 164, Appendix §§1-1 through 1-25 (hereinafter M.G.L. c. 164, App. §__). That enabling legislation provides that MMWEC's authority be "deemed and held to be in the performance of an essential public function." M.G.L. c. 164, §1-2. As "a public instrumentality," MMWEC is empowered to "acquire, construct, operate or otherwise participate in electric power facilities to meet the power requirements of its members." M.G.L. c. 164, §1-5(p); MMWEC may contract with non-member utility companies located inside or outside of Massachusetts. M.G.L. c. 164, App. §1-5(m).

(c) Because MMWEC has no stockholders, no retained earnings, and no independent source of funds, it borrows money in order to finance its acquisition or construction of electric facilities. When members and/or other contracting utilities express sufficient interest in a particular electric power source or facility, MMWEC creates a planning, acquisition, and financing vehicle knowns as a "project." To finance a project, MMWEC borrows needed funds through long-term revenue bonds or other forms of indebtedness M.G.L. c. 164, App. §1-9. It may issue such long-term bonds only if the Massachusetts Department of Public Utilities ("DPU"), after an adjudicatory hearing, determines such an issuance to be "reasonably necessary for the proposed purpose" and only upon such terms and conditions as the DPU may impose. M.G.L. c. 164, App. §1-17.

(d) As a result of initial DPU authorization of financing in 1976, 1977, 1980, and 1981, and contractual arrangements undertaken during the period of 1976 - 1982, MMWEC has purchased and presently maintains ownership of 11.59% (133,324 KW) of the capacity and output of the Seabrook Station. Under various power sales agreements, it sells that output to 28 Massachusetts participants, and one Rhode Island participant.

2. (a) As a joint owner of the Seabrook Station, MMWEC to date has made payments of the New Hampshire Nuclear Station Property Tax as follows:

Date	Amount
September 13, 1991	$ 649,230.40
December 15, 1991	649,230.40
April 10, 1992	649,230.40
Total	$1,947,691.20

(b) MMWEC does not engage in any business activity in New Hampshire within the meaning of that state's Business Profits Tax. Consequently it has not, and does not, pay any amounts under the statute. It has not, and does not, qualify for any credit or set-off under that tax.

(c) As mandated by its enabling legislation, M.G.L. c. 164, App. §1-6(b), (c), and by its power sales agreements, MMWEC has transmitted the Nuclear Station Property Tax onward to its project participants, which bill the tax expense to their customers (retail level consumers of business and residential

character), in the following manner. Since November, 1991, MMWEC has billed the tax increment monthly, under an annual budget as a level amount to each power sales agreement project participant contracting with MMWEC for the output of Seabrook Station capacity. The charges from MMWEC to its project participants are not subject to any rate regulation. M.G.L. c. 164, §1-10(b). The Massachusetts participants recognize the billings as a purchase power expense so as to be able to recover the expense from their customers. Those recoveries create revenues for repayment to MMWEC.

3. Presently MMWEC is participating in the preparation of the case before the Special Master as a source of information and evidence accrued from its role as a substantial joint owner of the Seabrook Station (Complaint, paragraph 7).

4. Its interests align generally with those of the Commonwealth of Massachusetts, but contain several independent and distinctive features.

(a) Its transmission of the New Hampshire tax burden directly to its municipal light department members, other contracting municipal light departments, and consumers, burdens those entities with whom it is in a relationship of ongoing business privity practicably closer and more immediate than those entities' parens patriae relationship with the Commonwealth. Individually, those entities lack the resources to challenge the

New Hampshire tax burden in these proceedings. MMWEC is able to participate, and is situated and motivated to protect the interests of those municipal light departments and those consumers to whom it reluctantly transmits the cost of the tax. In traditional terms it would have direct standing to assert the injury of the tax to itself and to its members, NAACP v. Button, 371 U.S. 415, 428 (1963); and jus tertii standing to assert the interests of its absent contracting purchasers and consumers. See generally Griswold v. Connecticut, 381 U.S. 479, 481 (1965); Barrows v. Jackson, 346 U.S. 249, 255-258 (1953); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); R.A. Sedler, Standing to Aseert Constitutional Jus Tertii in the Supreme Court, 71 YALE L.J. 599, 652-656 (1962); and NOTE, Standing to Assert Constitutional Jus Tertii, 88 HARV. L. REV. 423, 431-436 (1974).

(b) While the parens patriae standing of the Commonwealth appears to rest on firm grounds, Wyoming v. Oklahoma, 60 USLW 4119, 4123-4124 (1992), and Maryland v. Louisiana, 451 U.S. 725, 735-739 (1981), three dissenting Justices in the Wyoming case expressed the view that a state, claiming parens patriae standing in behalf of injured resident clients at the hands of absent third parties, must eliminate alternate or "variable" causes of the clients' injury so as to demonstrate that their harm flows reasonably directly or "traceab[ly]" from the challenged conduct of the defendant state. 60 USLW at 4127 (dissenting Opinion of Justice Scalia, joined by the Chief Justice and Justice Thomas).

(i) As an indicated "third party" in the causal chain of injury reaching the ultimate, but absent, ratepayer-taxpayer, MMWEC wishes to furnish information, evidence, and argument upon the course and effects of the tax.

(ii) In the same role, MMWEC wishes to corroborate the parens patriae standing of the Commonwealth against any doubts generated by the cited Wyoming dissenters' analysis.

5. MMWEC's participation will be efficient and unobtrusive. It has monitored all papers and proceedings to date and reflected carefully upon its proposed participation. It is familiar with the status and agenda of the case. It will conform its involvement to the existing plans of the Special Master.

CONCLUSION.

Therefore the Massachusetts Mutual Wholesale Electric Company requests the allowance of its Motion to Participate as an Amicus Curiae.

Respectfully submitted,

Nicholas J. Scobbo, Jr. (ns)
Mitchell J. Sikora, Jr.

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Dated: June 10, 1992.

CERTIFICATE OF SERVICE

I, Mitchell J. Sikora, Jr., an attorney for the proposed amicus curiae Massachusetts Municipal Wholesale Electric Company, hereby certify that I have today undertaken service of that client's Motion for Leave to Participate as Amicus Curiae by means of hand delivery or first class mailing of copies of the same to all counsel of record and to the clerk for Special Master Vincent L. McKusick.

Mitchell J. Sikora, Jr.

Dated: June 12, 1992.

(15)

Supreme Court, U.S.
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No. 119, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF CONNECTICUT,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,

Plaintiffs,

v.

STATE OF NEW HAMPSHIRE,

Defendant.

ANSWER OF DEFENDANT STATE OF NEW HAMPSHIRE TO THE COMPLAINT OF THE UTILITY INTERVENORS

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July 1, 1992

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IN THE

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OCTOBER TERM, 1991

No. 119, Original

STATE OF CONNECTICUT,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,

Plaintiffs,

v.

STATE OF NEW HAMPSHIRE,

Defendant.

ANSWER OF DEFENDANT STATE OF NEW HAMPSHIRE TO THE COMPLAINT OF THE UTILITY INTERVENORS

Defendant State of New Hampshire answers the Complaint of United Illuminating Company, New England Power Company, the Connecticut Light & Power Company and Taunton Municipal Lighting Plant ("the Utility Intervenors") as follows:

JURISDICTION AND STANDING

Complaint ¶ 1: The jurisdiction of this Court is based upon art. III, § 2, cl. 1 and 2 of the United States Constitution and 28 U.S.C. § 1251(a)(1)(1991).

ANSWER: Admitted that the Plaintiffs commenced this action and sought to invoke this Court's original jurisdiction but denied that this is an appropriate case for the exercise of original jurisdiction and denied that the Plaintiffs have standing to complain that the New Hampshire tax on Nuclear Station Property (the "Nuclear Property Tax") violates any provision of the Constitution or federal law. Further answering, the State of New Hampshire states that the Utility Intervenors have plain, speedy and adequate remedies to challenge the validity of the tax and have not exercised those remedies.

Complaint ¶ 2: The original complaint filed by plaintiffs seeks a declaratory judgment, pursuant to 28 U.S.C. § 2201 (1991), that the New Hampshire "Tax on Nuclear Station Property," 1991 N.H. Laws c. 354 (to be codified as N.H. Rev. Stat. Ann. ("RSA"), Chapter 83-D) (the "Seabrook Tax"), violates the rights and protections afforded to plaintiffs by the United States Constitution under art. VI, cl. 2 (Supremacy Clause); art. I, § 8 (Commerce Clause); the Equal Protection Clause of the Fourteenth Amendment; and art. IV, § 2 cl. 1 (Privileges and Immunities Clause); it also seeks to enjoin enforcement of the tax.

ANSWER: Admitted that Paragraph 2 describes certain relief the Plaintiffs seek in this action. The tax on Nuclear Station Property was codified as RSA 83-D on July 2, 1991.

Complaint ¶ 3: The Seabrook Nuclear Station, located in Seabrook, New Hampshire, is a facility used for the generation and transmission of electricity in interstate and intrastate commerce.

ANSWER: Admitted that the Seabrook Nuclear Station, located in Seabrook, New Hampshire, is a facility used for the generation of electricity and that some or all of the electricity generated may be, from time to time, sold in interstate commerce and some or all may be, from time to time, sold in intrastate commerce. Denied that the Seabrook Nuclear Station is used for the transmission of electricity in either interstate or intrastate commerce. Further answering, the State of New Hampshire states that the Nuclear Property Tax which is challenged in this case is a tax on "Nuclear Station Property," which is defined in the Act to exclude transmission lines.

Complaint ¶ 4: Intervenors are owners of the Seabrook Nuclear Station, and are liable for payment of taxes pursuant to the provisions of the Seabrook Tax. The individual intervenors, and their respective ownership interests in the Seabrook Nuclear Station, are as follows:

a. The United Illuminating Company is a Connecticut corporation with its principal place of business in New Haven, Connecticut. The United Illuminating Company owns and leases an aggregate 17.50% interest in the Seabrook Nuclear Station.

b. New England Power Company ("NEP"), a wholly owned subsidiary of New England Electric System ("NEES"), is a Massachusetts corporation with a principal place of business in Massachusetts. NEP owns an undivided 9.9% common interest in the Seabrook Nuclear Station. It sells power wholesale to two other wholly owned subsidiaries of NEES, Massachusetts Electric Company and Narragansett Electric Company, passing on to them the costs of the Seabrook Tax.

c. The Connecticut Light and Power Company, a wholly owned subsidiary of Northeast Utilities, is a Connecticut corporation with its principal place of business in Berlin, Connecticut. The Connecticut Light and Power Company owns 4.05985% of the Seabrook Nuclear Station.

d. Canal Electric Company, a wholly owned subsidiary of Commonwealth Energy System ("CES"), is a Massachusetts Business Trust with its principal place of business in Cambridge, Massachusetts. Canal Electric Company owns a 3.52% interest in the Seabrook Nuclear Station. It sells power wholesale to two other wholly owned subsidiaries of CES, Cambridge Electric Light Company and Commonwealth Electric Company, passing on the costs of the Seabrook Tax.

e. Montaup Electric Company is a wholly owned subsidiary of Eastern Edison Company ("EEC"), which, in turn, is a wholly owned subsidiary of Eastern Utilities Associates ("EUA"), with its principal place of business in Boston, Massachusetts. Montaup Electric Company owns 2.89% of the Seabrook Nuclear Station. It sells power wholesale to EEC and another wholly owned subsidiary of EUA, Blackstone Valley Electric Company, passing on the costs of the Seabrook Tax.

f. Taunton Municipal Lighting Power Plant is a quasi-autonomous department of the City of Taunton, a municipal corporation situated in Bristol County, Massachusetts. Taunton Municipal Lighting Plant owns 0.10034% of Seabrook Nuclear Station.

ANSWER: Admitted that the intervenors are some of the joint owners of the Seabrook Nuclear Station, except that the State of New Hampshire is informed and believes that the

percentage ownership interest of New England Power Company is 9.9577%, that the interest of Canal Electric Company is 3.5232% and that the interest of Montaup Electric Company is 2.8999%. The State of New Hampshire is without knowledge or information sufficient to form a belief as to the truth of the allegations concerning (i) the purchasers of wholesale power from the Utility Intervenors, (ii) how the costs of the Nuclear Property Tax are treated by Canal Electric Company, Montaup Electric Company or the other Utility Intervenors for rate making purposes for either retail or wholesale customers and (iii) how internal tax allocation agreements, which govern the allocation of tax liabilities and benefits among affiliates of a registered holding company pursuant to Securities and Exchange Commission regulations, determine the amount of Nuclear Property Tax actually paid by each company. Further answering, the State of New Hampshire is informed and believes that, in addition to the two wholly owned subsidiaries mentioned in ¶ 4b, New England Electric System has a wholly owned subsidiary, Granite State Electric Company, that is a New Hampshire corporation serving retail customers in New Hampshire receiving all of its electricity from New England Power Company, and that there is a tax allocation agreement among the subsidiaries of New England Electric System.

Complaint ¶ 5: The defendant is the State of New Hampshire.

ANSWER: Admitted.

Complaint ¶ 6: The Seabrook Tax imposes an *ad valorem* tax upon the value of nuclear station property at the rate of 0.64 percent of valuation. Chapter 354:1 (H.B. 64, § 1) to be codified as RSA 83-D:1. Each of the

intervenors is liable for the tax in proportion to its share of the ownership of the Seabrook Nuclear Station.

ANSWER: Admitted.

Complaint ¶ 7: The Seabrook Tax is linked to a second New Hampshire tax, the New Hampshire Business Profits Tax, by virtue of a credit provision. Pursuant to Chapter 354:2 (H.B. 64, § 2), amending RSA 77-A:5, payment of the Seabrook Tax entitles the taxpayer to a dollar-for-dollar credit against tax on its business profits, but only to the extent that the business profits are attributable to business done in New Hampshire.

ANSWER: Admitted that H.B. 64, which enacted chapter 83-D of the N.H. Rev. Stat. Ann. entitled "Tax On Nuclear Station Property," also amended other provisions of New Hampshire tax law, thereby adopting a new system of taxation for owners of nuclear station property. Admitted that one of the changes made by H.B. 64 is the addition of a new paragraph VI in the list of credits against the Business Profits Tax, in this case for the amount of Nuclear Property Tax paid by *any* utility subject to the Nuclear Property Tax, whether or not located in New Hampshire. Denied that the credit against the Business Profits Tax applies only to the extent that a taxpayer's business profits are "attributable to business done in New Hampshire," as that language does not appear in H.B. 64 or in the statute imposing the Business Profits Tax. Under the new tax system adopted in H.B. 64, a nuclear property taxpayer will always pay the nuclear property tax and the taxpayer's business profits will be taxable in New Hampshire (i) only to the extent that they are so large that they would produce a tax obligation in excess of the amount of Nuclear Property Tax paid and (ii) only to the extent that business profits are fairly apportioned to New Hampshire under the traditional three-factor formula which takes into account sales, payroll and ownership. Because one of the three factors is the ownership of property in New Hampshire and all of the Utility Intervenors have interests in a substantial piece of property located in New Hampshire, all of them will have a portion of their business profits, if any, apportioned to New Hampshire under the formula. It is unknown whether any of the owners will actually have business profits that are sufficiently large to require payment of a tax in excess of the amount of the Nuclear Property Tax.

Complaint ¶ 8: At the same time that New Hampshire enacted the Seabrook Tax, and provided for credit of that tax against the New Hampshire Business Profits Tax, it amended the New Hampshire Franchise Tax to exclude electric utilities from the definition of "public utility" and to exclude sales of electricity from the coverage of that tax. Chapter 354:3 and 4 (H.B. 64, §§ 3 and 4), amending RSA 83-C:1 (II), (IV).

ANSWER: Admitted.

Complaint ¶ 9: The New Hampshire taxation scheme is further discussed at paragraphs 5 through 23 of plaintiffs' complaint. The allegations of those paragraphs are incorporated herein by reference.

ANSWER: Except as amended herein, the State of New Hampshire incorporates its answers to paragraphs 5 through 23 of Plaintiffs' complaint as its answer to paragraph 9 of the Utility Intervenors' complaint. The State of New Hampshire amends its answer to paragraph 7 of the Plaintiffs' complaint to answer further that, in June, 1992, the 35.6% interest in

Seabrook Station presently owned by Public Service Company of New Hampshire will no longer be owned by that company, but instead will be transferred to and owned by a subsidiary of Northeast Utilities, North Atlantic Energy Company. As a result of this change in ownership, the State of New Hampshire also amends its answers to paragraphs 8 and 11 of the Plaintiffs' complaint to state that, upon the change in ownership, Public Service Company of New Hampshire will no longer be subject to the Nuclear Property Tax, which, as alleged in paragraph 8 of the Plaintiffs' complaint, is imposed only on entities with an ownership interest in Seabrook Station. Accordingly, New Hampshire's answer to paragraph 15 is also amended to admit that, after the change in ownership, Public Service Company of New Hampshire, which is alleged in paragraphs 11 and 15 to be the primary provider of electricity to New Hampshire consumers, will no longer be subject to the Nuclear Property Tax, not because of an exemption or a credit, but because it will not be an owner of Seabrook Station.

Complaint ¶ 10: Intervenors reallege, as though set forth in full, the allegations contained in paragraphs 1 through 9.

ANSWER: The State of New Hampshire incorporates its answers to paragraphs 1 through 9 of the Complaint as its answers to the allegations contained in paragraph 10.

Complaint ¶ 11: The operation of the New Hampshire taxation scheme constitutes a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity.

ANSWER: Denied.

Complaint ¶ 12: The operation of the New Hampshire taxation scheme directly and indirectly results in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

ANSWER: Denied.

Complaint ¶ 13: The operation of the New Hampshire taxation scheme is in conflict with the provisions of 15 U.S.C. § 391, which prohibit discriminatory taxation on or with respect to the generation or transmission of electricity, and the Supremacy Clause, art. VI of the United States Constitution.

ANSWER: Denied.

Complaint ¶ 14: Intervenors reallege, as though set forth in full, the allegations contained in paragraphs 1 through 12.

ANSWER: The State of New Hampshire incorporates its answers to paragraphs 1 through 12 of the Complaint as its answers to the allegations contained in paragraph 14.

Complaint ¶ 15: The operation of the New Hampshire taxation scheme results in discriminatory taxation of businesses like intervenors that have ownership interests in the Seabrook Nuclear Station but do not conduct sufficient business activities in New Hampshire

to be eligible for full use of the credit provided by Chapter 354:2 (H.B. 64, § 2), amending RSA 77-A:5, against tax on their business profits.

ANSWER: Denied.

Complaint ¶ 16: The operation of the New Hampshire taxation scheme is not fairly apportioned in that it exposes businesses like intervenors doing business in interstate commerce to the risk of multiple taxation on its ownership of the Seabrook Nuclear Station and on its business profits but protects businesses doing business solely in intrastate commerce from the risk of such multiple taxation.

ANSWER: Denied.

Complaint ¶ 17: The burdens of the New Hampshire taxation scheme are not fairly related to the services provided by New Hampshire.

ANSWER: Denied.

Complaint ¶ 18: The operation of the New Hampshire taxation scheme constitutes an impermissible burden on interstate commerce, in violation of art. I, § 8, cl. 3, of the United States Constitution (Commerce Clause).

ANSWER: Denied.

Complaint ¶ 19: The plaintiffs reallege, as though set forth in full, the allegations contained in paragraphs 1 through 12.

ANSWER: The State of New Hampshire incorporates its answers to paragraphs 1 through 12 of the Complaint as its answers to the allegations contained in paragraph 19.

Complaint ¶ 20: The operation of the New Hampshire taxation scheme, without legitimate or rational basis, imposes unequal and discriminatory tax burdens on businesses like intervenors that have ownership interests in the Seabrook Nuclear Station but do not conduct sufficient business activities in New Hampshire to be eligible for full use of the credit provided by Chapter 354:2 (H.B. 64, § 2), amending RSA 77-A:5, against tax on their business profits.

ANSWER: Denied.

Complaint ¶ 21: The operation of the New Hampshire taxation scheme deprives intervenors of the equal protection of the laws guaranteed under the Fourteenth Amendment to the United States Constitution.

ANSWER: Denied.

FIRST AFFIRMATIVE DEFENSE

ORIGINAL JURISDICTION

This is an inappropriate case for the exercise of this Court's original jurisdiction.

SECOND AFFIRMATIVE DEFENSE

LACK OF STANDING

The Utility Intervenors lack standing to invoke the original jurisdiction of this Court.

THIRD AFFIRMATIVE DEFENSE

FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

The Utility Intervenors have failed to state a claim upon which relief may be granted, because:

1. The Nuclear Property Tax is an *ad valorem* tax on property permanently located in the State of New Hampshire assessed at the same rate against each owner of the property, regardless of the state in which the owner is organized. Such a real property tax does not constitute a burden on interstate commerce or a violation of any other provision of the Constitution or federal law under any of the standards applied by this Court to evaluate state taxes.

2. The Utility Intervenors have no constitutional right to require the State of New Hampshire to reenact a franchise tax on New Hampshire electric utilities and the elimination of this tax and the enactment of an evenhanded tax on real property located in the State is not discriminatory.

3. The credit against New Hampshire's Business Profits Tax for amounts paid under the Nuclear Property Tax is available to all of the utility owners of Seabrook Station, regardless of the state in which they are organized, and the provision for such a credit does not render New Hampshire's system for taxation of owners of nuclear property discriminatory. If the actual immediate effect of the new system of taxation for owners of Nuclear Station Property

is considered, it is very likely that all owners will pay only the minimum Nuclear Property Tax amount and that no owners will incur an additional business profits tax obligation.

4. The Nuclear Property Tax is fairly related to the services provided by New Hampshire as that standard has been applied to state taxes challenged under the commerce clause because the measure of the tax (the value of property in New Hampshire) is reasonably related to the extent of contact each of the utilities has with the State of New Hampshire. Moreover, even though the Nuclear Property Tax is a general revenue tax, rather than a user fee for some specific facility or service provided by the State — making a factual inquiry into the extent of State services provided inappropriate in this case — the presence of Seabrook Station in New Hampshire and the unique burdens, costs and risks it presents for the State would support a factual conclusion that the tax is fairly related to the services provided by New Hampshire.

5. The Nuclear Property Tax is not a tax on the generation or transmission of electricity; it is not based on the amount of electricity generated or transmitted; it does not vary with variations in the electrical output of the plant; it is not suspended when the plant ceases operation (as it must for refueling and other contingencies) and the provisions of 15 U.S.C. § 391 are therefore inapplicable. Even if 15 U.S.C. § 391 were applicable, the Nuclear Property Tax would not violate its terms because, for the reasons described in subparagraphs 1 through 3, the tax does not discriminate against out-of-State interests.

6. Because the Nuclear Property Tax on its face and in application is a nondiscriminatory property tax, it does not violate the equal protection or privilege and immunities clauses of the United States Constitution.

THEREFORE, defendant State of New Hampshire respectfully requests that the Court dismiss the Complaint or enter judgment in its favor and against the Utility Intervenors and award it such other relief as may be appropriate.

Respectfully submitted,

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July 1, 1992

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Plaintiffs,

v.

STATE OF NEW HAMPSHIRE,

Defendant.

FINAL REPORT OF THE SPECIAL MASTER

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December 30, 1992

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FINAL REPORT OF THE SPECIAL MASTER
DECEMBER 30, 1992

I. BACKGROUND

A. Procedural History

On October 30, 1991, the State of Connecticut, the Commonwealth of Massachusetts and the State of Rhode Island and Providence Plantations ("Plaintiff States") sought to invoke this Court's original jurisdiction by moving for leave to file a complaint against the State of New Hampshire challenging the constitutionality of a

newly enacted *ad valorem* tax on nuclear station property (the "Seabrook Tax")[1] and related tax changes.

Suing in a proprietary capacity as themselves substantial consumers of electricity generated at Seabrook, and also in a *parens patriae* capacity as representatives of their citizen-consumers, the Plaintiff States urged this Court to declare the Seabrook Tax scheme unconstitutional on the grounds that it contravened (1) the Supremacy Clause of the United States Constitution, art. VI, cl. 2, by imposing a discriminatory tax in violation of 15 U.S.C. § 391; (2) the Commerce Clause, art. I, § 8, cl. 3, by imposing an undue burden on interstate commerce; (3) the Fourteenth Amendment, by depriving the Plaintiff States and their citizens of equal protection of the laws; and (4) the Privileges and Immunities Clause, art. IV, § 2, cl. 1.

On December 27, 1991, the New England Council and the Associated Industries of Massachusetts, representing private users of electricity, filed an amicus curiae brief in support of the States' motion to file.

On December 30, 1991, New Hampshire filed its brief in opposition to the motion to file, arguing that (1) the Plaintiff States, which did not themselves directly pay the Seabrook Tax, lacked standing to sue; (2) the suit was premature, in that the first tax returns reflecting imposition of the tax had not then been filed and the tax not yet passed through to customers in electric rates; (3) relief

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[1] The only nuclear generating station in New Hampshire (and thus the only facility affected by the tax) is the Seabrook Station located in the town of Seabrook, New Hampshire.

was available in an alternative forum; (4) extensive evidentiary hearings would be required; (5) injury was nonexistent or insubstantial; and (6) the Plaintiff States could not prevail on the merits.

The Plaintiff States filed their reply brief on January 10, 1992. On January 27, 1992, this Court granted the States' motion to file, allowing the Defendant State of New Hampshire 60 days to answer (Rehnquist, C.J., and Scalia, J., would have set the motion for oral argument; Souter, J., did not participate). Shortly after New Hampshire answered on March 25, 1992, two groups moved to intervene: (1) the Connecticut Office of Consumer Counsel ("Consumer Counsel") and (2) six of the utility owners of Seabrook Station; namely, The United Illuminating Company ("UI"), New England Power Company ("NEP"), The Connecticut Light and Power Company ("CL&P"), Canal Electric Company ("Canal"), Montaup Electric Company ("Montaup") and Taunton Municipal Lighting Plant ("Taunton") (collectively, "Utilities" or "Intervening Utilities").

On April 27, 1992, the Court appointed the undersigned special master in this case (Souter, J., not participating). After taking the oath of special master on May 1, 1992, I called a first meeting with counsel on May 15, 1992. By Order dated May 18, 1992, the Court referred to me the pending motions to intervene (Souter, J., not participating). On May 26, 1992, I filed with the Court my First Interim Report recommending that the Court deny the Consumer Counsel's motion to intervene, and grant

the motion of the six Utilities.[2] On June 15, 1992, the Court accepted the recommendations of the First Interim Report (Souter, J., not participating).

Following the first meeting of counsel on May 15, the parties, with outstanding professionalism and diligence, set about under my direction shaping up the issues and stipulating to the record. Counsel met with me again on June 15 and July 31, 1992, and worked intensively among themselves throughout the summer, culminating, at a final meeting with me on September 9, 1992, in their submission of an entire stipulated record for the presentation of the contested issues of law to the Court. The parties, in addition, had narrowed the legal issues in the case, with the Plaintiffs paring from four to two their alternative grounds for relief (retaining only their causes of action based on the Commerce Clause and 45 U.S.C. § 391).

The need for an evidentiary hearing having been obviated, I directed the Plaintiff States, the Intervening Utilities and the Amici to submit their briefs on the

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[2] For purposes of the proceedings before me, I likewise denied the motion of the Consumer Counsel and granted the motion of the six Utilities to intervene, nonetheless affording the Consumer Counsel amicus curiae status. Subsequently, I permitted two groups to participate as amici curiae in proceedings before me: the Massachusetts Municipal Wholesale Electric Company ("MMWEC"), a governmental entity and a joint owner of Seabrook Station, and a trade group consisting of the New England Council, the Associated Industries of Massachusetts and the Connecticut Business & Industry Association. This Court granted MMWEC amicus curiae status by order dated June 22, 1992 (Souter, J., not participating).

merits by October 9, 1992, New Hampshire to submit its brief on the merits by November 9, and the Plaintiff States, the Intervening Utilities and the Amici to submit any reply briefs by November 23. All parties complied. Oral argument was held before me at the Edward T. Gignoux United States Courthouse in Portland, Maine, on December 8, 1992. I now submit this Final Report.

B. Factual Summary

The parties have stipulated a full record for submission of the legal issues to the Court. I present the following factual synopsis to explain the background for my recommended conclusions of law.

1. The Setting of This Litigation

The largest of the eight nuclear generating stations in New England, the Seabrook Station is the only one located in New Hampshire. Seabrook is owned jointly as tenants in common by 12 utilities doing a retail electric business, either directly or through affiliates, in the States of New Hampshire, Connecticut, Massachusetts, Rhode Island and Vermont. Those 12 utility owners of Seabrook and their respective percentage shares are set forth in Appendix A attached to this Report.

The Seabrook Station began generating electricity in May 1990, nearly 15 years after the Nuclear Regulatory Commission first issued a permit for its construction. The project had been marked by much controversy and delay, with three Seabrook owners – Public Service Company of New Hampshire ("PSNH"), New Hampshire Electric

Cooperative, Inc. ("New Hampshire Co-op") and EUA Power Corporation ("EUA Power") – filing for bankruptcy.

Following the start of power generation at the Seabrook Station, the State of New Hampshire reexamined the manner in which its sole nuclear facility was taxed. At the time, Seabrook's owners were subject to two possible State taxes: the New Hampshire Franchise Tax (assessed upon receipts from the sale of gas or electricity pursuant to franchises granted by the State of New Hampshire) and the New Hampshire Business Profits Tax (assessed on the share of a company's, or unitary business's, profits allocable to New Hampshire on the basis of a three-part formula).[3]

New Hampshire's reexamination culminated in the enactment of Chapter 354 of the 1991 Laws of New Hampshire, which, effective July 1, 1991, (1) repealed the application of the Franchise Tax to electric utilities, (2) created the Seabrook Tax[4] and (3) granted a credit for the amount paid in Seabrook Tax against any Business Profits Tax owed. N.H. Rev. Stat. Ann. §§ 83-D:2-3, 83-D:6, 77-A:5(VI); 83-C:1 (II) & (IV). Two provisions – the Seabrook Tax and the credit against the Business Profits Tax for

[3] The Seabrook Station is also subject to *local* property taxes and *State* assessments for special purposes, including nuclear plant decommissioning and the preparation, maintenance and operation of the State's emergency nuclear response program.

[4] New Hampshire imposes no other statewide *ad valorem* tax on electric utility property; however, the State has imposed statewide property taxes on other types of business, including a tax on railroad property.

Seabrook Tax paid – were declared nonseverable in the event either were found unconstitutional. 1991 N.H. Laws ch. 354, § 19.

2. The Seabrook Tax

The Seabrook Tax is an *ad valorem* tax, assessed annually at 0.64 percent of the valuation of:

> land, buildings, structures, tunnels, machinery, dynamos, apparatus, poles, wires, nuclear fuel and fixtures of all kinds and descriptions used in generating, producing, supplying and distributing electric power or light from the fission of atoms, exclusive of transmission lines.

N.H. Rev. Stat. Ann. § 83-D:2. The tax is assessed on each of the joint owners of nuclear station property in proportion to its ownership share. N.H. Rev. Stat. Ann. § 83-D:5.[5]

Going into effect on July 1, 1991, the Seabrook Tax was limited to a half-year collection in that year, based on a total valuation set by the Legislature of $3.5 billion. N.H. Rev. Stat. Ann. § 83-D:9. For the last half of 1991, Seabrook's joint owners collectively paid $11.2 million in Seabrook Tax.

[5] Revenues derived from the Seabrook Tax are credited to New Hampshire's General Fund and are not segregated or reserved for the payment of costs attributable to the operation of a nuclear power plant. The General Fund finances a wide variety of State services, among them police and fire protection, maintenance of the judicial system and various educational programs.

Chapter 354 provided for subsequent valuation by the New Hampshire Department of Revenue Administration. N.H. Rev. Stat. Ann. § 83-D:4. The valuation for 1992 is expected to increase to approximately $3.75 billion. Based upon that figure, Seabrook Tax payments for 1992 will total approximately $24 million.

3. The Impact of the Seabrook Tax

i. The Plaintiff States' Proprietary Consumption

The Plaintiff States are themselves substantial consumers of electricity purchased from owners of the Seabrook Station or their affiliates. The record shows that in the fiscal year ended June 30, 1992, Massachusetts purchased from them approximately $11.5 million of electricity and Rhode Island, approximately $14.9 million of electricity. During the prior fiscal year Connecticut had purchased approximately $38.8 million of electricity from Seabrook owners.

ii. The Plaintiff States' Citizens' Consumption

Approximately 97 percent of the population of Connecticut, 64 percent of the population of Massachusetts and 100 percent of the population of Rhode Island purchase electricity from joint owners of the Seabrook Station or their affiliates.

iii. The Pass-Through of the Seabrook Tax Cost to Consumer Rates

The Federal Energy Regulatory Commission ("FERC") regulates the sale of electricity at wholesale

between certain Seabrook owners and (1) their retail subsidiaries, (2) their retail affiliates and/or (3) other utilities. State regulatory authorities regulate the rates of retail sales of electricity by most of the joint owners of Seabrook or their retail affiliates. For at least one of the utility owners of Seabrook, the Massachusetts Municipal Wholesale Electric Company ("MMWEC"), neither FERC nor State approval is necessary to pass through Seabrook Station costs to consumer rates.

Utilities regulated by FERC and/or the States have, with regulatory approval, begun passing through the cost of the Seabrook Tax to customer rates in the States of New Hampshire, Massachusetts and Rhode Island. *See* Appendix B. Utilities not subject to rate regulation have also passed the cost through to customers in those States. *Id.* In addition, the Connecticut Department of Public Utility Control has authorized UI to begin recovering the cost of the Seabrook Tax in retail rates charged to the State of Connecticut and other Connecticut consumers beginning on January 1, 1993.

4. The New Hampshire Business Profits Tax

New Hampshire imposes a Business Profits Tax upon the profits of all businesses operating in New Hampshire save for tax-exempt nonprofit corporations. N.H. Rev. Stat. Ann. §§ 77-A:1(I), 77-A:2.

The Business Profits Tax is imposed on a "unitary business" basis, with New Hampshire in effect piercing the corporate veil for tax purposes by taxing New Hampshire's allocable portion of any holding group's entire income, rather than the income in isolation of the member

or members of the group doing business in New Hampshire. N.H. Rev. Stat. Ann. §§ 77-A:1(XIV), 77-A:3(III). Businesses (or unitary groups) deriving "gross business profits from business activity both within and without this state" must apportion profits "so as to allocate to this state a fair and equitable proportion of such business profits." N.H. Rev. Stat. Ann. § 77-A:3(I).

Allocation, in turn, is accomplished by applying a three-part statutory formula through which the interstate business (or unitary group):

- calculates its percentage of in-state property compared with all property everywhere;
- calculates its percentage of in-state compensation paid compared with all compensation paid everywhere; and
- calculates its percentage of in-state sales compared with all sales everywhere.

N.H. Rev. Stat. Ann. § 77-A:3(I); *see* note 13 below. The business (or unitary group) then adds the property factor to the compensation factor and 1.5 times the sales factor. N.H. Rev. Stat. Ann. § 77-A:3(II)(a). That total divided by 3.5 equals the percentage of income allocable to New Hampshire. *Id.* The share of income allocable to New Hampshire is then taxed at a rate of 8 percent. N.H. Rev. Stat. Ann. § 77-A:2.

i. The Interaction of the Seabrook Tax Credit and the Business Profits Tax

The 1991 New Hampshire Legislature in the same Chapter 354 that enacted the Seabrook Tax provided a credit for that tax against any Business Profits Tax liability of a Seabrook owner or, as applicable, its unitary

group. N.H. Rev. Stat. Ann. § 77-A:5(VI). The Seabrook Tax credit may be taken in full, dollar-for-dollar, against Business Profits Tax liability in the year for which Seabrook Tax is paid; unused credit may not be carried forward.

For 1991, the year at the midpoint of which the Seabrook Tax took effect, only one owner of the Seabrook Station paid any Business Profits Tax to the State of New Hampshire. *See* Appendix C. This owner's unitary business, New England Electric System ("NEES"), used its Seabrook Tax credit of $1,115,258 with other credits to reduce its Business Profits Tax liability to $127,382; it would have paid no Business Profits Tax at all in 1991 if the Seabrook Tax had been in effect for the full year. In 1991 three others used their Seabrook Tax credit to wipe out completely their Business Profits Tax liability; five were not subject to the Business Profits Tax because they are tax-exempt; and the remaining three did not incur any Business Profits Tax liability because they (or their unitary group) did not have net profits. *Id.*

The Plaintiffs project that for both 1992 and 1993, no Seabrook joint owner will pay the Business Profits Tax for the same mix of reasons – tax-exemption, lack of net profits and use of the Seabrook Tax credit.[6] *See* Appendix C.

ii. The Seabrook Tax Credit in the Context of Interstate Taxation

The three Plaintiff States, Connecticut, Massachusetts and Rhode Island, all impose business profits taxes and

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[6] The Plaintiffs acknowledge that projections are based on assumptions and that final results could be different; they introduce these projections merely for purposes of illustrating the operation of the New Hampshire tax system.

apply to interstate income allocation formulas based on the same three factors used by New Hampshire. Conn. Gen. Stat. §§ 12-213 *et seq.*; Mass. Gen. L. ch. 63, § 52A; R.I. Gen. Laws §§ 41-13-1 *et seq.* None of the three Plaintiff States either imposes a statewide *ad valorem* tax on nuclear station property or affords a credit against its own business profits taxes for Seabrook Tax paid. As a result, Seabrook owners (or their unitary groups) remain liable for taxation in the Plaintiff States on all of their income not attributable to New Hampshire. *See* Appendix C.

5. Distribution of the Ownership of the Seabrook Station

At the outset of this action, the largest share of the Seabrook Station (35.56942 percent) was owned by PSNH, which serves retail electric customers in New Hampshire. Most of the balance of the Seabrook ownership (about 60 percent) was held by utilities that, directly or indirectly, serve customers outside New Hampshire. *See* Appendix A. On June 5, 1992, by a Plan of Reorganization approved in its Chapter 11 bankruptcy proceeding, PSNH became a wholly owned subsidiary of Northeast Utilities ("NU") and transferred to another newly formed subsidiary of NU, North Atlantic Energy Corporation ("North Atlantic"), its ownership in Seabrook Station, retaining, however, by contract the right to continue to receive the entire 35.56942 percent share of the Seabrook production for as long as the Station operates. For purposes of the New Hampshire Business Profits Tax, PSNH by its reorganization in bankruptcy became a member of the "unitary business" consisting of NU and its subsidiaries, including another Seabrook owner, The Connecticut Light and Power Company ("CL&P"). *See* Appendix A.

C. The Contentions of the Parties

The Plaintiffs, having pared down the number of grounds for their constitutional challenge to the Seabrook Tax scheme,[7] press the following contentions before this Court:

1. This case falls within, and remains appropriate for the exercise of, the Court's original jurisdiction.

2. The Seabrook Tax and credit scheme offends the Supremacy Clause of the United States Constitution in that it discriminates against interstate commerce in violation of 15 U.S.C. § 391 (proscribing discriminatory State taxation "on or with respect to" the generation or transmission of electricity).[8]

3. The Seabrook Tax and credit scheme discriminates against interstate commerce in violation of the Commerce Clause of the United States Constitution.[9]

4. The Court, in addition to entering a permanent injunction against the collection of the Seabrook Tax,

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[7] The Plaintiffs have waived contentions that the Seabrook Tax scheme violates the Equal Protection and the Privileges and Immunities Clauses of the United States Constitution. They have in addition waived two of their three original grounds for Commerce Clause attack: that the scheme is (1) unfairly apportioned and (2) unrelated to services provided by New Hampshire.

[8] The Intervening Utilities in addition contend that the Seabrook Tax standing alone violates Section 391. *See* notes 11, 17 below.

[9] The Intervening Utilities in addition contend that the Seabrook Tax standing alone violates the Commerce Clause. *See* note 17 below.

should order retrospective relief through refund of the Seabrook Tax paid minus amounts owed on the Business Profits Tax in the absence of the Seabrook Tax credit.

New Hampshire, for its part, contends that:

1. New facts reveal that the Plaintiffs lack standing to bring this case and that, in addition, this case is non-justiciable.

2. Neither the Seabrook Tax standing alone, nor the Seabrook Tax and credit scheme, offends Section 391.

3. Neither the Seabrook Tax standing alone, nor the Seabrook Tax and credit scheme, offends the Commerce Clause.

4. Retrospective relief is barred by the Eleventh Amendment or, alternatively, is inappropriate because the Plaintiffs have suffered no injury and because New Hampshire should be permitted to revise its own tax system retrospectively to cure any defect.

II. RECOMMENDED CONCLUSIONS OF LAW

A thorough review of the Stipulated Record and careful consideration of the parties' excellent briefs and oral argument have led me to the following conclusions of law, which I now recommend to the Court for adoption:

A. This case remains appropriate for the exercise of the Court's original jurisdiction.

B. The Seabrook Tax and credit violate 15 U.S.C. § 391.

C. The Seabrook Tax and credit violate the Commerce Clause.

D. A refund of all Seabrook Tax paid less the credits taken against the Business Profits Tax is the proper remedy.

My reasons for making these recommendations follow.

RECOMMENDATION A: This case remains appropriate for the exercise of the Court's original jurisdiction.

New Hampshire argues that one changed circumstance now undermines original jurisdiction of this case: That the evidence now shows there is no "case or controversy" because there is no discrimination against the Plaintiff States. *Cf. Wyoming v. Oklahoma*, 112 S. Ct. 789, 796 (1992) (noting Oklahoma's failure to point to "any change of circumstance, whether of fact or law," justifying dismissal of case for lack of standing). Initially, as New Hampshire notes, the Plaintiff States contended before this Court that in-state consumers effectively were exempt from the Seabrook Tax while out-of-state consumers bore its brunt. The Stipulated Record has since shown that (1) all Seabrook owners have paid, and are projected to pay, the Seabrook Tax; (2) none (save one in 1991) has paid, or is projected to pay, the Business Profits Tax; (3) in-state owners have been unable to use the credit because they, being tax-exempt or nonprofitable, have not been liable for any Business Profits Tax; and (4)

customers in New Hampshire have borne as much of the burden of the Seabrook Tax as those in the Plaintiff States.

New Hampshire's "changed circumstance" strikes me as an argument on the merits rather than an assertion of a jurisdictional flaw, but assuming that it is relevant, it does not suffice to oust the Court of jurisdiction. New Hampshire's argument presupposes that the stipulated facts reveal no possible pattern of discrimination or injury and therefore do not suffice to confer standing on the Plaintiff States and the Intervening Utilities or to present a justiciable controversy to the Court. To the contrary, the Plaintiff States and the Intervening Utilities assert sufficient injury upon which to premise jurisdiction by demonstrating that the Intervening Utilities are liable for and have been paying the challenged tax, the Plaintiff States and their citizens have been purchasing electricity generated by the Seabrook Station, and the cost of the Seabrook Tax has generally been passed through to them as consumers of Seabrook-generated electricity. Assuming the Seabrook Tax and credit are in some respect unconstitutional (the legal question to be resolved by the Court), the Plaintiffs' "injury" (the burden of an unconstitutional tax) " 'fairly can be traced to the challenged action of the defendant[.]' " *Maryland v. Louisiana*, 451 U.S. 725, 736 (1981) (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). That asserted wrong in turn would "furnish[] ground for judicial redress[.]" *Id.* at 735-36 (quoting *Massachusetts v. Missouri*, 308 U.S. 1, 15 (1939)). No more is required for standing and justiciability.

In no other respect does New Hampshire at this stage take issue with the Court's grant last January of the

Plaintiff States' motion for leave to commence this original jurisdiction action. Nonetheless, I note that this case is, if possible, even more appropriate for the Court's exercise of original jurisdiction than when first accepted. No other suit to date has been filed that raises the issues herein presented, nor is there a readily identifiable alternative forum in which all of the parties could assert their claims. This case, involving a tax on New Hampshire's only nuclear power plant that affects four other New England States, is one of the utmost seriousness and dignity. Considerations of judicial economy, in addition, now weigh in the balance. The parties have expended considerable energy and resources to stipulate the facts and fully brief and argue the issues before me. The matter is ripe for decision.

I have no hesitation in recommending that this Court retain jurisdiction of this most pressing and serious matter.

RECOMMENDATION B: The Seabrook Tax and credit violate 15 U.S.C. § 391.

Pursuant to 15 U.S.C. § 391, no State may "impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity." A tax is discriminatory, for purposes of Section 391, "if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce."

The Seabrook Tax is in my view a tax "with respect to the generation or transmission of electricity" that, in combination with its credit, discriminates in contravention of Section 391.

1. Section 391 applies to the Seabrook Tax and credit.

No legislative history elucidates the meaning of the phrase "on or with respect to" in Section 391; nor did the Court have occasion to consider the question in the leading case applying the statute, *Arizona v. Snead*, 441 U.S. 141 (1979). The phrase "with respect to," however, customarily signals broad application. *See, e.g.*, The Random House Dictionary of the English Language 1640 (2d ed. 1987) (defining "respect" in the phrase "with respect to" as "relation or reference"). *See also Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2036-37 (1992) (construing similar phrase, "related to," broadly in context of Airline Deregulation Act preemption). The correctness of this construction resonates in the interstices of the statute itself. The full phrase is "on *or* with respect to"; the phrase "with respect to" would be mere surplusage if too narrowly construed. The disjunctive "or" in the full phrase is echoed in the later definition of discrimination, proscribing taxation that "directly *or indirectly*" results in disproportionate burdens. Indirect higher tax burdens can result from taxes not directly on (but nonetheless affecting) generation or transmission of electricity.[10]

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[10] Two State high courts have addressed the question whether a tax falls "on or with respect to" generation or transmission of electricity for purposes of Section 391. The Supreme Court of Nevada held (correctly, in my view) that a tax on the right to receive electricity from tax-exempt property (the Nevada side of the Hoover Dam) fell within the purview of Section 391. Although the statute at issue "purport[ed] to tax only the value of the right to receive electricity, the difference is one without a distinction. Nevada's tax directly impacts on the transmission of electricity to Cities, who in turn, must increase the cost of electrical power to their resident-consumers." *Nevada v. Burbank*, 691 P.2d 845, 847 (Nev. 1984). *Cf. Pacific Power & Light Co. v. Montana Dep't of Revenue*, 773 P.2d 1176, 1185 (Mont. 1989), *cert. denied*, 493 U.S. 1049 (1990) (holding, in the alternative, that "beneficial use" tax was not encompassed by Section 391 because it fell "neither upon the generation nor the transmission of electrical power, but upon the use of tax exempt facilities").

In form, the Seabrook Tax is a property tax; however, it is in substance and reality a tax "with respect to" generation or transmission of electricity. It is a tax exclusively on property that by definition is "used in generating, producing, supplying and distributing electric power or light from the fission of atoms, exclusive of transmission lines." N.H. Rev. Stat. Ann. § 83-D:2. It is paid by taxpayers whose business is the generation of electricity. It can be (and in many instances already has been) passed through to consumers, thus imposing a "tax burden" on electricity.

2. The Seabrook Tax and credit discriminate against interstate commerce in violation of Section 391.[11]

Having determined that the Seabrook Tax falls within the ambit of Section 391, I next examine whether the

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[11] The Intervening Utilities make an alternative contention that the Seabrook Tax alone, without the credit, discriminates against out-of-state consumers in violation of Section 391. I recommend rejection of that contention for the same reasons as I recommend rejection of the parallel assertion that the Seabrook Tax by itself violates the Commerce Clause. *See* note 17 below.

Seabrook Tax and credit combination "results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce."

The Seabrook Tax, like the New Mexico Electrical Energy Tax at issue in *Arizona v. Snead*, 441 U.S. 141, is a tax on in-state activity (ownership of generating station property in one case; generation of electricity in the other) that in itself evenhandedly affects interstate and intrastate commerce. The two percent Electrical Energy Tax was assessed on all generation of electricity within the State of New Mexico, regardless of final destination. The Seabrook Tax likewise is assessed on all owners of Seabrook in direct proportion to their ownership interests, regardless of final destination of Seabrook electricity.

The Seabrook Tax scheme, in addition, replicates the flaw identified by this Court in the New Mexico Electrical Energy Tax scheme: allowance of a credit for a local tax paid against a separate local tax owed, with a resultant discrimination against interstate commerce. Payors of the New Mexico Electrical Energy Tax were allowed a credit against a tax inherently assessed only on in-state activity – the gross receipts tax on intrastate sales of electricity.[12]

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[12] The New Mexico tax statute provided that the credit could be taken only for Electrical Energy Tax paid on "electricity generated inside this state and consumed in this state[.]" 441 U.S. at 143 n.4. As a practical matter, the same result would have obtained even if the statute had allowed all Electrical Energy Tax paid to be credited against the gross receipts tax. The coverage of the gross receipts tax (in-state sales of electricity, *i.e.*, electricity consumed within the State) was coextensive with the

Payors of the Seabrook Tax likewise are allowed a credit against a tax inherently assessed only on in-state activity – the Business Profits Tax, assessed on income allocable to New Hampshire by virtue of a formula based on sales, payroll and property ownership in-state.[13]

It is true that the New Hampshire tax scheme differs from the New Mexico tax scheme in that, whereas the New Mexico scheme had a determinate outcome (the credit always halved the amount of gross receipts tax due), the effect of the New Hampshire scheme varies depending on such factors as the extent of income allocable to New Hampshire, the profitability in any given year of a Seabrook owner (or its unitary group) and the percentage share of Seabrook owned. Still, the fact that the *extent* of discrimination fluctuates should not obfuscate its existence. *See, e.g., Maryland v. Louisiana*, 451 U.S. at 760 (noting, in context of Commerce Clause analysis, "We

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coverage of the Electrical Energy Tax paid on electricity generated within and consumed within the State.

[13] Under New Hampshire's apportionment formula, a business (or unitary group) compares its percentage of "property owned, rented and employed" in New Hampshire versus everywhere; its percentage of "total compensation paid" to employees in New Hampshire versus everywhere; and its percentage of "total sales, including charges for services" in New Hampshire versus everywhere. N.H. Rev. Stat. Ann. § 77-A:3(I)(a)(b) & (c). New Hampshire then provides that "[a] fraction, the numerator of which shall be the property factor in subparagraph I(a) plus the compensation factor in subparagraph I(b) plus 1.5 multiplied by the sales factor in subparagraph I(c) and the denominator of which is 3.5, shall be applied to the total gross business profits (less foreign dividends) of the business organization to ascertain its gross business profits in this state." N.H. Rev. Stat. Ann. § 77-A:3(II)(a).

need not know how unequal the Tax is before concluding that it unconstitutionally discriminates").

The bottom line – and the critically material feature – of the Seabrook Tax-credit combination is that, the more of a utility's total net income is allocated to New Hampshire, the greater that utility's ability to shelter total income from taxation (up to the amount of Seabrook Tax paid). The discriminatory workings of this feature are most readily apparent with respect to a utility that operates only in New Hampshire and therefore allocates 100 percent of its income to New Hampshire. The credit ensures that such a utility will pay only one tax, the Seabrook Tax, up to the point where its Business Profits Tax liability exceeds the amount of the Seabrook Tax. The two intrastate utilities owning shares of Seabrook in 1991 happened to pay no Business Profits Tax that year for reasons unrelated to the credit – tax-exemption (New Hampshire Co-op) and lack of net profit (PSNH) – but the Seabrook Tax credit "backstopped" any intrastate utility, *guaranteeing* that, no matter what its profits picture or tax status, its intrastate customers would pay only one tax up to the point of the full Seabrook Tax paid.

Assume, for example, that Seabrook Station is owned in equal shares by Owner A and Owner B. All of Owner A's income, and 50 percent of Owner B's income, is allocable to New Hampshire. Owner A and Owner B each earn $100,000,000. At the statutory rate of 8 percent, Owner A's Business Profits Tax liability is $8,000,000; Owner B's, $4,000,000. Owner A and Owner B each pay

$10,000,000 in Seabrook Tax.[14] Using the Seabrook Tax credit, Owner A escapes Business Profits Tax on *all* of its income (and hence passes through only one tax, the Seabrook Tax, to its customers); Owner B escapes tax in New Hampshire on only 50 percent of its total income and is subject to tax in other States for the balance.[15]

While a discriminatory impact is most easily perceptible in this in-state versus out-of-state comparison, the New Hampshire tax scheme operates to discriminate in varying degrees among Seabrook owners with interstate operations, again depending on how much total income is allocable to New Hampshire. To revisit my previous hypothetical, assume three Seabrook owners: Owner A with 50 percent of its income allocable to New Hampshire, Owner B with 30 percent and Owner C with 20 percent. Each earns $100,000,000 and pays $10,000,000 in Seabrook Tax. Owner A is subject to $4,000,000 in Business Profits Tax; Owner B, $2,400,000; and Owner C, $1,600,000. Using the Seabrook Tax credit, Owner A shelters 50 percent of its total income from profits taxation, Owner B 30 percent and Owner C 20 percent, each remaining liable for corporate income taxation in the States of Connecticut, Massachusetts and Rhode Island

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[14] The Seabrook Tax is projected to outstrip the Business Profits Tax owed by every joint owner liable therefor in 1992 and 1993. Had the Seabrook Tax been assessed for the full year instead of half-year in 1991, it would have outstripped Business Profits Tax liability for all owners in that year as well. *See* Appendix C.

[15] The discriminatory effect is also illustrated by an example drawn from the Stipulated Record, discussed in my section on the Commerce Clause at pp. 29-34 below.

(as is in actual fact the case). Owner A is able to use 40 percent of its total possible Seabrook Tax credit; Owner B, 24 percent; and Owner C, 16 percent. Owner A is better off than Owner B, and Owner B is better off than Owner C, for one reason: greater business activity in New Hampshire.[16] This greater relative "burdening" of Owner C and Owner B ("manufacturers, producers, wholesalers, retailers") results "indirectly" from the Seabrook Tax and credit scheme, in contravention of 15 U.S.C. § 391.

RECOMMENDATION C: The Seabrook Tax and credit violate the Commerce Clause.

To determine whether the New Hampshire tax scheme violates the Commerce Clause, I begin my analysis by noting the principle underlying the Clause: "The very purpose of the Commerce Clause was to create an area of free trade among the several States." *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328 (1977) (quoting *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944)). In order to implement the explicit dictate of the Commerce Clause that "Congress shall have Power . . . To regulate Commerce . . . among the several States," U.S. Const. art. I, § 8, cl. 3, as well as the free trade principle underlying it, the Clause has been interpreted to give

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[16] Again, the "skeleton" revealed in this hypothetical is fleshed out by facts of record, as discussed at page 33 below and displayed in the charts of Appendix C.

affirmative protection to free trade among the several States:

> [T]he Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. . . . [T]he Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States.

Boston Stock Exchange, 429 U.S. at 328 (quoting *Freeman v. Hewit*, 329 U.S. 249, 252 (1946)). While the constitutional structure guarantees the "power of the states to tax for the support of their own governments," *Gibbons v. Ogden*, 9 Wheat 1, 199 (1824), the Commerce Clause operates to ensure that taxes imposed by the States do not discriminate against interstate commerce. "No State may, consistent with the Commerce Clause, 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'" *Boston Stock Exchange*, 429 U.S. at 329 (quoting *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959)).

The test for validity of a tax under the Commerce Clause is four-fold. A State tax is permissible if it "(1) has a substantial nexus with the State; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the State." *Maryland v. Louisiana*, 451 U.S. at 754 (citing *Washington Revenue Dep't v. Washington Stevedoring Ass'n*, 435 U.S. 734, 750 (1978)). This four-factor test, earlier stated in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274,

277-78 (1977), is often referred to as the *Complete Auto* test.

Determining the validity of a State statute under the Commerce Clause involves a "delicate balancing of the national interest in free and open trade and a State's interest in exercising its taxing powers requir[ing] a case-by-case analysis . . . ." *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 403 (1984). *See also Freeman v. Hewit*, 329 U.S. at 252-53. Such case-by-case analysis has left " 'much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation'." *Boston Stock Exchange*, 429 U.S. at 329 (quoting *Northwestern States*, 358 U.S. at 457). Nevertheless, application of the Court's decisions in *Boston Stock Exchange* and *Westinghouse* to the facts of the case at bar leave little room for controversy and confusion here.

1. The Seabrook Tax and credit discriminate against interstate commerce both facially and in effect.

Although New Hampshire maintains that it has only enacted an *ad valorem* property tax, the total tax scheme is obviously more than a mere property tax.[17] Rather, it is a

[17] The fact that about 60 percent of the Seabrook Station is owned by utility companies selling electricity directly or indirectly to out-of-state consumers does not make the Seabrook Tax standing alone (without the credit) violative of the Commerce Clause. *See Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 624-25 (1981) (Montana severance tax on coal mined in the State upheld against Commerce Clause challenge despite fact that 90 percent of coal was shipped out of State); *Nordlinger v. Hahn*, 112 S. Ct. 2326 (1992) (California property tax permitting longer term property owners to pay lower taxes than new owners of comparable property upheld as a reasonable tax classification). It would be hard to say that New Hampshire did not have a reasonable basis for establishing different tax schemes for a nuclear plant, indeed the largest nuclear plant in New England, and fossil fuel and hydro plants.

hybrid tax scheme involving both a property tax and a credit against the Business Profits Tax up to the full amount of property tax liability. The fact that the Seabrook Tax and the credit provision were enacted in the same legislative act suggests that they were intended to function together to impose a new property tax levy and simultaneously to provide relief in the same amount from the Business Profits Tax on income allocable to New Hampshire business activity. Indeed, the two are firmly linked by a nonseverability clause that provides that the Seabrook Tax and the credit provision must stand or fall together in the face of a challenge to their constitutionality. The two provisions operate in tandem to impose a property tax liability, on the one hand, and to relieve liability to New Hampshire for the Business Profits Tax to the full extent of the property tax liability, on the other.

The Court has repeatedly struck down State tax statutes that impose a greater tax burden on economic activities taking place outside the State than on similar in-state activities. *Maryland v. Louisiana*, 451 U.S. 725; *Boston Stock Exchange*, 429 U.S. 318; *Westinghouse*, 466 U.S. 388. In *Maryland v. Louisiana*, the Court invalidated a Louisiana statute that imposed a "first-use" tax on natural gas brought into the State but also provided local users with

a number of credits and exemptions. 451 U.S. at 756. Similarly, in *Boston Stock Exchange*, the Court invalidated a New York stock-transfer tax that imposed a lesser tax on nonresidents for in-state sales than for out-of-state sales and capped residents' tax liability for in-state sales, but not for out-of-state sales, at a statutory maximum. 429 U.S. at 330-32. The New York tax scheme examined in *Boston Stock Exchange* violated the Commerce Clause requirement that "no State may discriminatorily tax the products manufactured or the business operations performed in any other State." 429 U.S. at 337. Most recently, in *Westinghouse*, the Court invalidated a New York tax scheme that provided a tax credit against the New York Franchise Tax to Domestic International Sale Corporations ("DISCs") for export shipments made from New York but not from other States. 466 U.S. at 393, 407. The Court declared these tax schemes unconstitutional because they "encouraged the development of local industry by means of taxing measures that imposed greater burdens on economic activities taking place outside the State than were placed on similar activities within the State." 466 U.S. at 404.

The New Hampshire tax scheme plainly falls within the ambit of this prohibition because the credit against the Business Profits Tax is valuable only to the extent that a Seabrook owner conducts taxable business activities in New Hampshire. The Seabrook Tax scheme adopted by New Hampshire lowers the tax burden of any Seabrook owner as its New Hampshire sales, employees and property increase and thereby affirmatively places interstate commerce at a disadvantage by giving preferential tax treatment to companies with more significant intrastate

activities. Like the Louisiana first-use tax, New Hampshire's taxing scheme provides a credit that discriminates against interstate commerce in favor of local interests. The structure of the Seabrook Tax and credit adopted by New Hampshire necessarily benefits those owners with more significant New Hampshire activities by wiping out their Business Profits Tax to the extent of their Seabrook Tax liability. For example, two Seabrook owners with the same share of ownership in Seabrook and the same total income, but one with a 100 percent in-state business and the other with only 50 percent in-state, are treated quite differently. (*See* discussion of hypothetical at pages 22-24 above.) The owner that operates only in New Hampshire will pay only one tax, the Seabrook Tax,[18] whereas the owner that operates interstate will have to pay both the Seabrook Tax and also out-of-state taxes on the 50 percent of its income allocated elsewhere.

Because the New Hampshire Business Profits Tax is determined by a formula based on employees, sales and property in New Hampshire, owners with a significant Seabrook Tax liability have an incentive to shift employees, sales and additional property into New Hampshire in order to use up the Seabrook Tax credit and to shield income from taxation in other States. That

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[18] Experience with the Seabrook Tax and credit in operation in 1991 and as projected in 1992 and 1993 demonstrates that the Seabrook Tax will as a practical matter exceed the Business Profits Tax. *See* Appendix C. In 1991 that was not true for New England Electric System ("NEES") (the "unitary business" group of which New England Power Company ("NEP") is a member) only because the Seabrook Tax was in effect for six months, instead of a full year.

incentive is strongly illustrated by the actual consequences of the June 5, 1992, acquisition of New Hampshire's largest electric retailer, Public Service Company of New Hampshire ("PSNH"), by Northeast Utilities ("NU"). *See Chart 1.* In 1991 NU through its subsidiary, The Connecticut Light and Power Company ("CL&P"), owned a 4.05985 percent interest in the Seabrook Station and, because in New Hampshire it had no other property and almost no sales or payroll, only about ²/₃ of one percent (0.68%) of the NU Group's income was allocable to New Hampshire for tax purposes.[19] As a result, in 1991 the NU Group could use only about 13.4 percent of its full-year Seabrook Tax credit.[20]

That situation changed radically on June 5, 1992, when NU acquired PSNH as a subsidiary and took over PSNH's 35.56942 percent share in Seabrook through a newly formed subsidiary, North Atlantic Energy Corporation ("North Atlantic").[21] *See* Appendix A. By that

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[19] For 1991 the breakdown of the NU Group's business activities in New Hampshire and systemwide is: property ownership, 2.2904 percent ($159,217,025 in New Hampshire and $6,951,521,899 everywhere); compensation paid employees, 0.0792 percent ($332,420 in New Hampshire and $419,594,843 everywhere); and sales, 0.00445 percent ($125,528 in New Hampshire and $2,818,519,581 everywhere).

[20] In order to compare the years 1991 and 1993 (i.e., the years before and after the PSNH reorganization of June 5, 1992), I assume that a full year of Seabrook Tax is paid in both years.

[21] No change occurred in the body of customers served by PSNH's 35.56942 percent share of the Seabrook production. By a contract lasting as long as the Seabrook Station operates, PSNH continues to be entitled to that full share of the power from Seabrook.

CHART 1

NORTHEAST UTILITIES ("NU") GROUP

Comparison of NU Group's Use of Seabrook Tax Credit – 1991 and 1993
Before and After Public Service Company of New Hampshire Came into the Group

	% Share Owned in Seabrook	% of Total Income Allocable to N.H.	Combined Net Income After RSA 77-A:4 Adjustments	Seabrook Tax	Business Profits Tax	% of Income Taxable in Other States	% of Seabrook Tax Credit Used
1991	4.05985%	0.6789%	$224,921,764	$454,704 ($909,408 - for full year)	$122,160	99.3%	26.9% (13.4%)*
1993	39.62927%	20.67% (estimated)	$505,637,000 (estimated)	$9,505,525	$8,361,213 (3,719,306)**	79.3%	88.0% (39.1%)**

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* Assuming that the Seabrook Tax had been in effect throughout 1991.

** Assuming that the NU Group in 1993 has only the same combined net income ($224,921,764) as it had in 1991, rather than its projected income of $505,637,000.

transaction the percentage of the NU Group's systemwide income that is allocable to New Hampshire in 1993 increased some 30-fold to a projected 20.67 percent.[22] Even assuming that the NU Group has only the same systemwide income in 1993 as in 1991 (the NU Group actually projects that it will have more than twice as much income in 1993), it will in 1993 use 39 percent of its Seabrook Tax credit, as compared with only 13.4 percent in 1991.[23]

On June 5, 1992, the NU Group did exactly what the Seabrook Tax and credit scheme creates a strong incentive to do: By acquiring PSNH it increased many-fold its sales, employment and property ownership in New Hampshire. The NU Group thereby benefits from preferential tax treatment under the Seabrook Tax and credit scheme both in absolute terms (using a projected credit of $8,361,213 to wipe out its projected 1993 Business Profits Tax as compared with a usable credit of only $122,160 in 1991) and in relative terms (being able to use at least 39 percent of its credit in 1993 as compared with 13.4 percent in 1991

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[22] For 1993 the projected breakdown of the NU Group's New Hampshire activities is: property owned in New Hampshire, 16.57 percent ($1,442,700,000 in New Hampshire and $8,707,596,000 everywhere); compensation paid to employees, 23.19 percent ($87,272,000 in New Hampshire and $376,313,000 everywhere); and sales, 21.73 percent ($841,194,000 in New Hampshire and $3,870,828,000 everywhere).

[23] If in 1993 the NU Group has income of $505,637,000 as it now projects – rather than its 1991 income of $224,921,764 – it will take advantage of 88.0 percent of its Seabrook Tax credit.

for the same amount of income).[24] Such preferential tax treatment of in-state activities is prohibited by the Commerce Clause.

The unconstitutionally preferential treatment accorded the NU Group, which now includes the largest retail electric business in New Hampshire, is also dramatized by comparing its situation with that of the Seabrook owners that have no business activity whatever in New Hampshire other than holding an ownership share in Seabrook. Canal Electric Company ("Canal") (owning 3.52317 percent of Seabrook) has no employees or sales in New Hampshire and in 1992 expects to be able to use only 8.2 percent of its Seabrook Tax credit. *See* Appendix C, p. C-2. For the same reason, The United Illuminating Company ("UI") (owning 17.5 percent of Seabrook) expects to be able to use only 6.8 percent of its Seabrook Tax credit in 1992. *Id.* The Commerce Clause prohibits this patently preferential treatment of the Seabrook owner on the basis of its greater in-state business activity.

The incentive to shift business into the State is buttressed by the certitude that Seabrook owners will be subjected to similar business profits or corporate income taxes in the other States in which they operate on that portion of their total income that is not allocated to New Hampshire. Under the Seabrook Tax and credit scheme, a Seabrook owner who pays $1 million in Seabrook Tax is allowed to avoid tax on up to $12.5 million in business

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[24] The NU Group also gets a preferential tax treatment in 1992, but it is proportionately reduced by the fact that PSNH did not come into the Group until June 5 in this year.

profits but only if those profits are earned in New Hampshire. In fact, all three of the Plaintiff States also tax business profits and use allocation formulas based on the same three factors used by New Hampshire: property, payroll and sales. Seabrook owners are exposed to multiple taxation to the extent that they conduct their business activities "among the several States" and do not get the full advantage of their Seabrook Tax credit.

Whether the incentive established by the Seabrook Tax and credit scheme is strong enough alone to cause Seabrook owners in fact to move business activity into New Hampshire is immaterial to a finding of discrimination against interstate commerce. Also it is completely immaterial that another opportunity, comparable to that of acquiring PSNH, by which an electric utility could so dramatically increase its New Hampshire allocation of income, is unlikely to present itself soon. The Court has rejected the argument that a substantial and actual effect on business conduct is requisite to holding a State tax discriminatory under the Commerce Clause:

> Even if the tax is not now the sole cause of New York residents' refusal to trade on out-of-state exchanges, at the very least it reinforces their choice of an in-state exchange and is an inhibiting force to selling out of State: that inhibition is an unconstitutional barrier to the free flow of commerce.

Boston Stock Exchange, 429 U.S. at 334 n.13. So long as an actual incentive to favor in-state business activities is established, the extent of the discrimination does not need exact calibration. In *Maryland v. Louisiana*, 451 U.S. at 760, the Court declined to hold further hearings to

determine the exact extent of discrimination, once it was satisfied that some discrimination did in fact exist:

> It may be true that further hearings would be required to provide a precise determination of the extent of the discrimination case, but this is an insufficient reason for not now declaring the Tax unconstitutional and eliminating the discrimination. We need not know how unequal the Tax is before concluding that it unconstitutionally discriminates.

The Court has often laid down the principle that a State may not use its power to tax in a manner that places interstate commerce at a disadvantage in competition with intrastate commerce.[25] The Seabrook Tax and credit violate that principle.

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[25] The large number of tax credits used by States would not be endangered by the ruling I recommend, any more than they were by the Court's ruling in *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984), declaring invalid a New York tax credit that could be taken only for export shipments made from New York. The Court rejected the parade of horribles presented by New York in *Westinghouse*, reasoning that only tax credits allowed on an impermissible basis violate the Commerce Clause:

> The Tax Commission seeks to classify the tax credit at issue here as an indirect subsidy to export commerce, similar to provision and maintenance of ports, airports, waterways, and highways; to provision of police and fire protection; and to enactment of job-incentive credits and investment-tax credits. . . . We reiterate that it is not the provision of the credit that offends the Commerce Clause, but the fact that it

2. The Seabrook Tax and credit scheme does not pass the "internal consistency" test.

The unconstitutionality of the New Hampshire Seabrook Tax and credit scheme is confirmed by application of the "internal consistency" test. That test, first announced in *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159 (1983), was applied there to determine whether a tax was properly apportioned under the second *Complete Auto* factor. The Court has, in more recent cases, applied the internal consistency test also to the third *Complete Auto* factor, to determine whether a tax discriminates against interstate commerce. *See, e.g., American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 284-86 (1987); *Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 483 U.S. 232, 240-43 (1987); *Armco Inc. v. Hardesty*, 467 U.S. 638, 644-45 (1984). In *Armco*, 467 U.S. at 644, the Court explicitly declared that the internal consistency test is properly used on the discrimination question:

> In *Container Corp. of America v. Franchise Tax Board* [citations omitted], the Court noted that a tax must have "what might be called internal consistency – that is the [tax] must be such that, if applied by every jurisdiction," there would be no impermissible interference with free trade. In

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> is allowed on an impermissible basis, i.e., the percentage of a specific segment of the corporation's business that is conducted in New York.

Id. at 406 n.12. Further, even if a State statute appears discriminatory on its face, the statute may be saved by a showing that "it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988) (dictum).

> that case, the Court was discussing the requirement that a tax be fairly apportioned to reflect the business conducted in the State. A similar rule applies where the allegation is that a tax on its face discriminates against interstate commerce.

Thus, *Armco* unambiguously applied an internal consistency analysis to the discrimination question by considering whether "if applied by every jurisdiction, there would be no impermissible interference with free trade." *Id.*

Without question, the Seabrook Tax and credit scheme fails the internal consistency test. If every State were to adopt that tax scheme – allowing a credit for taxes on local nuclear property only against taxes on local business profits – then utilities owning "nuclear property" in one State but earning part of their income elsewhere would face a risk of multiple taxation not faced by utility owners conducting all of their business activity within a single State. Seabrook owners earning profits on business activity only in New Hampshire pay only one tax up to the level of the Seabrook Tax. In contrast, Seabrook owners earning equivalent profits from business activity in part elsewhere, but owning no other nuclear property, are subject to two taxes, the Seabrook Tax plus a business profits tax owed to other States. Thus, the New Hampshire tax scheme favors those Seabrook owners earning profits on business activity in New Hampshire over those owners earning equivalent business profits partly in other States. This result is contrary to the basic Commerce Clause principle that "a State may not tax a transaction or incident more heavily when it

crosses state lines than when it occurs entirely within the State." *Armco Inc. v. Hardesty*, 467 U.S. at 642.

The Seabrook Tax and credit scheme also fails the internal consistency test because, as already discussed, it creates an incentive to shift business activities into a State in which a nuclear station owner has an unused amount of nuclear property tax credit. If companies holding nuclear property in several States do not shift their activities to use fully the available tax credits, they would operate under a heavier total tax burden than similarly situated companies earning profits solely or mainly in one state. The effect on companies with unused tax credits would be to exert "an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure rather than 'among the several States.' U.S. Const., art. I, § 8, cl. 3." *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. at 286-87. In *Scheiner*, the Court applied the internal consistency test to invalidate a Pennsylvania axle tax that applied equally to Pennsylvania-registered and non-Pennsylvania-registered vehicles. The Court reasoned that, if every other State imposed an equal flat axle tax, the cumulative effect of several States' flat axle taxes would severely burden interstate motor carriers that would pay multiple flat taxes in all the States they traverse whereas intrastate carriers would pay only one tax. 483 U.S. at 284-86. The Seabrook Tax and credit scheme, if imposed in every State, would have a similar effect of imposing a severe financial burden on those utilities holding nuclear properties in several States and unable to use their full tax credits in each State.

RECOMMENDATION D: A refund of all Seabrook Tax paid less the credits taken against the Business Profits Tax is the proper remedy.

Having recommended that the Court hold that the Seabrook Tax and its accompanying credit violate both 15 U.S.C. § 391 and the Commerce Clause, I turn to a consideration of the appropriate remedy. New Hampshire contends that in these circumstances any relief should be prospective only. I recommend, however, that the Court (1) apply its decision retrospectively; (2) determine that the Eleventh Amendment does not bar retrospective monetary relief; and finally (3) order New Hampshire to refund all Seabrook Tax collected by it, reduced by the amounts of Business Profits Tax due as a result of the elimination of the Seabrook Tax credit.

1. This decision should apply retroactively.

As an initial matter, I recognize that the continued viability of the retroactivity analysis used by the Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), may be in doubt. *See, e.g., James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991). In any event, even assuming that the *Chevron* analysis still is good law, the circumstances of today's recommended decision do not in my view warrant deviation from the customary rule of retrospective application. *Chevron* delineated three factors to be weighed in making the determination whether a decision should apply only prospectively:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . . Second, . . . "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." . . . Finally, we have weighed the inequity imposed by retroactive application . . . .

Chevron, 404 U.S. at 106-07 (citations omitted). Of these factors, the first is decisive. The decision recommended today results from a straightforward application of existing law to the present facts. The decision apparently would for the first time invalidate a tax-and-credit combination based on a property tax and a credit against an income tax. Nonetheless, the principles underlying my recommendation were enunciated in *Arizona v. Snead*, 441 U.S. 141 (as regards Section 391), and in a long line of Commerce Clause cases, most notably *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, *Maryland v. Louisiana*, 451 U.S. 725, and *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388. This Court repeatedly has struck down tax-and-credit combinations that have the effect of favoring in-state interests by crediting a local tax paid against a local tax owed.

Both the second and third *Chevron* factors likewise counsel retrospective application. The purposes of the Commerce Clause and of Section 391 appear to me to be best served by enforcing a decision retroactively because

it reasonably should have been apparent to New Hampshire that its Seabrook Tax and credit scheme was of dubious constitutionality. No legitimate reliance expectation of New Hampshire is disturbed. To the extent New Hampshire suffers hardships as a result of a retroactive decision, they are largely of its own making. *Cf. American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 183 (1990) (noting, under third factor of *Chevron* analysis, that invalidation of tax had "the potential for severely burdening the State's operations . . . [but that] burden may be largely irrelevant when a State violates constitutional norms well established under existing precedent").

2. The Eleventh Amendment is no bar to ordering refunds to the payors of the Seabrook Tax.

Monetary relief in an original jurisdiction action violates the Eleventh Amendment only if damages are awarded on behalf of specific individuals. *Maryland v. Louisiana*, 451 U.S. at 745 n.21; *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 258 n.12 (1972) ("An action brought by one state against another violates the Eleventh Amendment if the plaintiff State is actually suing to recover for injuries to designated individuals").

In this case, as the Court implicitly determined in granting the motion to file a complaint, the Plaintiff States are *not* "actually suing to recover for injuries to designated individuals." They sue to recover for injuries to themselves, as well as to the great majority of their citizens, that are directly traceable to the Seabrook Tax and credit combination. Refund to the taxpayers (the 12

Seabrook owners) is merely the mechanism through which the States seek to be made whole.

The Eleventh Amendment does not bar such a refund order in an original jurisdiction action, as this Court acknowledged by employing a similar channel of relief in *Maryland v. Louisiana*, 452 U.S. 456, 457 (1981) (ordering refund of Louisiana's first-use tax to "taxpayers"); 451 U.S. at 731 (noting that taxpayers are pipeline companies and producers).

3. A refund is the proper retrospective remedy.

The Seabrook owners were "under duress" to pay the Seabrook Tax when due and were relegated to postpayment refund action.[26] For that reason, a retroactive application of my recommended decision requires that the Plaintiffs be given "meaningful backward-looking relief[.]" *McKesson Corp. v. Division of Alcoholic Beverages*, 496 U.S. 18, 31 (1990).

The question remains, however, whether refund is the proper and appropriate avenue to provide such relief. In cases of tax discrimination (which theoretically could be remedied in a number of ways), this Court has tended to remand to State courts to allow States the initial chance to correct the offending tax system. *See, e.g., McKesson*, 496 U.S. at 32 n.16; *Tyler Pipe Indus., Inc. v. Washington*

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[26] New Hampshire imposes various sanctions on nonpayment of taxes. *See, e.g.*, N.H. Rev. Stat. Ann. § 21-J:28 (imposing interest on amounts not paid when due); N.H. Rev. Stat. Ann. § 21-J:28-d (authorizing distraint of property); N.H. Rev. Stat. Ann. § 21-J:31 (imposing penalty for failure to file return).

Dep't of Revenue, 483 U.S. at 252-53. A *McKesson*-type remand nonetheless is inappropriate in this case for two reasons. First, unlike *McKesson* or *Tyler*, this case is an original jurisdiction action. The Court is acting simultaneously as the trial court and the court of last resort; it literally cannot "remand" to any other tribunal, and it accordingly should itself provide complete and final relief. *See, e.g., Wyoming v. Oklahoma*, 112 S. Ct. 789, 803 (1992) (noting, in rejecting Special Master's recommendation that question of severability be remanded to State, "[t]his action is one between two States presented under our original jurisdiction; this Court is the appropriate forum to decide issues necessary to afford the complaining State complete relief. . . . We deem it proper and advisable to address the issue of severability ourselves").

Second, and more importantly, New Hampshire explicitly declared the Seabrook Tax and credit nonseverable. 1991 N.H. Laws ch. 354, § 19 ("It is the intent of the legislature that sections 1 and 2 of this act [creating the Seabrook Tax and credit] be considered a unit and their provisions inseparable. If any provision of sections 1 and 2 of this act is declared unconstitutional, then sections 1 and 2 and all of their provisions shall be invalid"). This is a critical distinction from *McKesson*, in which "the Florida courts did not invalidate the Liquor Tax in its entirety; rather, they declared the tax scheme unconstitutional only insofar as it operated in a manner that discriminated against interstate commerce." 496 U.S. at 39. New Hampshire thus shut its own door on the *McKesson* invitation to "reformulate and enforce the . . . [t]ax during the contested tax period in any way that treats petitioner and its competitors in a manner consistent with the dictates of

the Commerce Clause." *Id.* at 40. New Hampshire contends that its nonseverability clause by using the phrase "*shall* be invalid" meant that only a prospective invalidation would result; however, New Hampshire's clear intent that its tax package be nonseverable, combined with the recommended retroactivity of this decision (an entirely separate analysis for this Court, rather than New Hampshire, to make), compel the conclusion that the Seabrook Tax and credit scheme should be struck down retroactively in its entirety.

In the case at bar there appears to be no legal justification for departing from the usual rule of full retroactivity for the recommended decision. Application of the usual rule, recognizing that the Seabrook Tax and credit were unconstitutional from the start, would put the parties back into the positions they would have held if New Hampshire had never adopted its unconstitutional tax scheme. That result can be achieved by permitting New Hampshire to retain out of its Seabrook Tax collections only the amounts of Business Profits Tax it would have collected from the Seabrook owners if the offending tax statute had not been enacted.

III. CONCLUSION

On the basis of the above conclusions of law, I recommend that the Court permanently enjoin the State of New Hampshire from collecting the Seabrook Tax and that the Court order the State of New Hampshire to refund to each owner of the Seabrook Station all sums collected from it in Seabrook Tax, less the total amount of credits

for that tax taken by that owner against its liability for the Business Profits Tax. At this time I make no recommendation as to interest on the refunds, for the reason that the parties have not yet been heard on that issue. A proposed Decree embodying my recommendations is attached as Appendix D.

Respectfully submitted,

VINCENT L. MCKUSICK
Special Master
One Monument Square
Portland, Maine 04101
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December 30, 1992

APPENDIX A

THE OWNERS OF SEABROOK STATION

1. North Atlantic Energy Corporation ("North Atlantic"), a New Hampshire corporation and a subsidiary of Northeast Utilities ("NU"), a Massachusetts association, owns 35.56942 percent. At relevant times prior to June 5, 1992, this 35.56942 percent share was owned by the bankrupt Public Service Company of New Hampshire ("PSNH"), a New Hampshire corporation. On that date, pursuant to the Plan of Reorganization in its bankruptcy proceeding, PSNH transferred its Seabrook ownership share to North Atlantic, a newly formed NU subsidiary, and PSNH itself became an NU subsidiary also. By contract PSNH is entitled to North Atlantic's entire 35.56942 percent pro rata share of the electricity generated at the Seabrook Station.

2. The United Illuminating Company ("UI"), a Connecticut corporation, owns 17.5 percent.

3. EUA Power Corporation ("EUA Power"), a New Hampshire corporation and a subsidiary of Eastern Utilities Associates ("EUA"), a Massachusetts association, owns 12.13240 percent.

4. Massachusetts Municipal Wholesale Electric Cooperative ("MMWEC"), a political subdivision of Massachusetts, owns 11.59340 percent.

5. New England Power Company ("NEP"), a Massachusetts corporation and a subsidiary of New England Electric System ("NEES"), a Massachusetts association, owns 9.95766 percent.

6. The Connecticut Light and Power Company ("CL&P"), a Connecticut corporation and a subsidiary of NU, owns 4.05985 percent.

7. Canal Electric Company ("Canal"), a Massachusetts corporation and a subsidiary of Commonwealth Energy System ("COM/Energy"), a Massachusetts association, owns 3.52317 percent.

8. Montaup Electric Company ("Montaup"), a Massachusetts corporation that is a subsidiary of Eastern Edison Company ("Eastern Ed"), which is in turn a subsidiary of EUA, owns 2.89989 percent.

9. New Hampshire Electric Cooperative, Inc. ("New Hampshire Co-op") owns 2.17391 percent.

10. Vermont Electric Generation & Transmission Cooperative, Inc. ("Vermont Co-op"), located in the State of Vermont, owns 0.41259 percent.

11. Taunton Municipal Lighting Plant ("Taunton"), a department of the City of Taunton, Massachusetts, owns 0.10034 percent.

12. Town of Hudson (Massachusetts) Light and Power Department ("Hudson") owns 0.07737 percent.

APPENDIX B

SELECTED RATE PASS-THROUGHS

With FERC authorization, North Atlantic included the Seabrook Tax in wholesale rates charged to PSNH, which in turn passed the tax along to retail customers in New Hampshire.

With FERC authorization, Canal included the Seabrook Tax in wholesale rates charged to Commonwealth Electric Company and Cambridge Electric Light Company, which in turn included the tax in retail rates charged to their Massachusetts customers pursuant to approvals given by the Massachusetts Department of Public Utilities in October 1991.

With FERC authorization, NEP included the Seabrook Tax in wholesale rates charged to various affiliated companies, which then passed the tax on to customers in Massachusetts, Rhode Island and New Hampshire.

With FERC authorization, Montaup included the Seabrook tax in wholesale rates to affiliated companies, which passed the tax on to customers in Massachusetts and Rhode Island.

MMWEC, which does not require FERC authorization, has passed along the Seabrook Tax to municipal light departments in Massachusetts, which in turn passed it along to retail customers.

Taunton and Hudson, neither of which is required to obtain regulatory approval, have already included the Seabrook Tax in the calculation of rates charged to customers in Massachusetts.

APPENDIX C
PROFILES OF SEABROOK OWNERS
1991

	% Ownership Share in Seabrook*	% of Total Income Allocable to N.H.	Combined Net Income After RSA 77-A:4 Adjustments	Seabrook Tax	Bus. Profits Tax	% of Income Taxable in Other States**	% of Seabrook Tax Credit Used**
Canal (part of COM/Energy Group, a unitary business)	3.52317%	3.9993%*** ($1,272,827)	$31,826,238	$394,435	$101,826 paid 0 after credit	96%	25.8%
UI	17.5%	13.3827%*** ($1,726,517)	$12,901,110	$1,960,000	$131,376 paid 0 after credit	86.6%	6.7%
NEP (part of NEES Group, a unitary business)	9.95766%	7.9199% ($20,181,143)	$254,815,631	$1,115,258	$1,614,491 paid $127,382 after credit****	92.1%	100%
CL&P (part of NU Group, a unitary business)	4.05985%	0.6789%*** ($1,526,994)	$224,921,764	$454,704	$122,160 paid 0 after credit	99.3%	26.9%

---

* Five of Seabrook Station's 12 owners, Taunton, Hudson, MMWEC, Vermont Co-op and New Hampshire Co-op, were not subject to Business Profits Taxation in 1991 and are not expected to be in 1992 or 1993 because they are non-profit entities. Three owners incurred losses in 1991 and are expected to incur losses in 1992, resulting in no liability for Business Profits Tax: PSNH, Montaup and EUA Power.

** I have extrapolated the percentages in the last two columns from data of record.

*** Allocation of income to New Hampshire based solely on ownership in Seabrook.

**** In 1991 the Seabrook Tax was in effect for only ½ year. If it had been in effect for the full year 1991, the amount of the Seabrook Tax would have been double and the credit would have eliminated all Business Profits Tax for the NEES Group.

1992 (Estimated)

	% Ownership Share in Seabrook	% of Total Income Allocable to N.H.	Combined Net Income After RSA 77-A:4 Adjustments	Seabrook Tax	Bus. Profits Tax	% of Income Taxable in Other States	% of Seabrook Tax Credit Used
Canal (part of COM/Energy Group, a unitary business)	3.52317%	4.1152%** ($869,731)	$21,134,598	$844,729	$69,578 paid 0 after credit	95.9%	8.2%
UI	17.5%	13.5467%** ($3,576,329)	$26,400,000	$4,197,571	$286,106 paid 0 after credit	86.5%	6.8%
NEP (part of NEES Group, a unitary business)	9.95766%	7.93% ($20,036,874)	$252,671,800	$2,388,456	$1,602,950 paid 0 after credit	92.1%	67.1%
CL&P and North Atlantic (parts of NU Group, a unitary business)	4.05985% 35.56942% since 6/5/92 for North Atlantic Total= 39.62927%	14.29%* ($35,887,620)	$251,138,000	$5,856,058	$2,871,010 paid 0 after credit	85.7%	49%

---

* On June 5, 1992 PSNH, under a plan of reorganization in its Chapter 11 bankruptcy proceeding, became part of the NU Group, transferring its ownership share in Seabrook to North Atlantic, another member of the NU Group.

** Allocation of income to New Hampshire based solely on ownership in Seabrook.

1993 (Estimated)

–	% Ownership Share in Seabrook	% of Total Income Allocable to N.H.	Combined Net Income After RSA 77-A:4 Adjustments	Seabrook Tax	Bus. Profits Tax	% of Income Taxable in Other States	% of Seabrook Tax Credit Used
Canal (part of COM/Energy Group, a unitary business)	3.52317%	3.9805%* ($1,161,430)	$29,178,000	$845,072	$92,914 paid 0 after credit	96%	11%
UI	17.5%	13.5467%* ($3,975,956)	$29,350,000	$4,197,571	$318,076 paid 0 after credit	86.5%	7.6%
NEP (part of NEES Group, a unitary business)	9.95766%	7.93% ($19,285,633)	$243,198,400	$2,388,456	$1,542,851 paid 0 after credit	92.1%	64.6%
CL&P and North Atlantic (parts of NU Group, a unitary business)	4.05985% 35.56942% Total= 39.62927%	20.67% ($104,515,168)	$505,637,000	$9,505,525	$8,361,213 paid 0 after credit	79.3%	88%
Montaup and EUA Power (parts of EUA Group, a unitary business)	2.89989% 12.13240%	10.9857% ($1,904,042)	$17,332,000	$3,605,663	$152,323 paid 0 after credit	89%	4.2%

* Allocation of income to New Hampshire based solely on ownership in Seabrook.

APPENDIX D

PROPOSED DECREE

CONNECTICUT, et al. v. NEW HAMPSHIRE

No. 119, Original.

Decided _____ Decree Entered _____

Decree carrying into effect this Court's opinion of ___, ___ U.S. ___ (199).

DECREE

This cause having come on to be heard on the Report of the Special Master heretofore appointed by the Court, and the exceptions filed thereto, and having been argued by counsel for the several parties, and this Court having stated its conclusions in its opinion announced on ___, ___ U.S. ___, and having considered the positions of the respective parties as to the terms of the decree, IT IS ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. The New Hampshire Tax on Nuclear Station Property and the credit against the New Hampshire Business Profits Tax, both as enacted by 1991 N.H. Laws ch. 354, now codified at N.H. Rev. Stat. Ann. §§ 83-D and 77-A:5(VI), are unconstitutional and unenforceable.

2. Effective with the date of entry of this decree, the Defendant State of New Hampshire and its officers, agents, and employees are permanently enjoined and prohibited from collecting the New Hampshire Tax on Nuclear Station Property.

3. Within thirty (30) days after the entry of this decree, the Defendant State of New Hampshire shall

refund [,with interest at the rate of %,] to each owner of a share of the Seabrook Nuclear Facility the total sum heretofore collected from that owner on account of the New Hampshire Tax on Nuclear Station Property, less the total amount of credits for that tax taken by that owner against its liability for the New Hampshire Business Profits Tax.

4. Within thirty (30) days after the entry of this decree, the Defendant State of New Hampshire also shall render to the Plaintiff States, and shall file with the Court, a full and accurate account of all moneys that are due to be paid, or have been paid, by the State of New Hampshire pursuant to the preceding paragraph of this decree.

5. The Court retains jurisdiction to entertain such further proceedings, enter such orders, and issue such writs as may from time to time be deemed necessary or advisable to give proper force and effect to this decree or to effectuate the rights of the parties in the premises.

Supreme Court, U.S.
FILED
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No. 119, Original

In The

Supreme Court of the United States

October Term, 1992

STATE OF CONNECTICUT, COMMONWEALTH OF MASSACHUSETTS, AND STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS,

Plaintiffs,

v.

STATE OF NEW HAMPSHIRE,

Defendant.

SUPPLEMENT TO THE FINAL REPORT OF THE SPECIAL MASTER

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February 1, 1993

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No. 119, Original

In The

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STATE OF CONNECTICUT, COMMONWEALTH OF MASSACHUSETTS, AND STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS,

Plaintiffs,

v.

STATE OF NEW HAMPSHIRE,

Defendant.

SUPPLEMENT TO THE FINAL REPORT OF THE SPECIAL MASTER

February 1, 1993

My Final Report dated December 30, 1992, made no recommendation as to interest on any Seabrook Tax refunds ordered by the Court, for the reason that the parties had not then been heard on that issue. Promptly after filing the Final Report with the Court, I requested the parties to file memoranda addressing the question "whether the recommended refunds should carry interest and, if so, at what rate."

On January 15, 1993, the Plaintiff States in their two-sentence response to my request stated that they took no position on the question whether interest should be

added to the refund.[1] On the same date five[2] of the six Intervening Utilities filed a brief contending that the Court should award both postjudgment and prejudgment interest. Postjudgment interest, they argued, should be set at the same rate awarded by statute on money judgments issued by the federal district courts, and prejudgment interest, at a rate reflecting the cost to the utilities of borrowing the lost funds or, alternatively, at a rate equal to that prescribed by a New Hampshire statute for the refund of overpayments of New Hampshire taxes (10%).

In its brief filed on January 22, 1993, the Defendant State of New Hampshire, contending that the interest issue should not and need not be addressed, agreed that if postjudgment interest were awarded, it should be at the statutory rate applied to money judgments in the federal district courts. New Hampshire further argued that in no event should prejudgment interest be awarded, but if it were, it could most conveniently be set at the same statutory rate as postjudgment interest.

On January 29, 1993, the five Intervening Utilities, in a reply brief, proposed as a second, alternative measure of prejudgment interest the rate prescribed for postjudgment interest in federal district courts.

For the sake of completeness and to avoid later litigation on the interest question, I herewith supplement the

---

[1] The Plaintiff States also stated: "If the Court orders interest on the refund, [P]laintiff States do not oppose the rate proposed by the [I]ntervenors."

[2] Intervenor Connecticut Light and Power Company did not participate in either the brief or the reply brief filed by the other five Intervening Utilities.

Recommended Conclusions of Law stated in my Final Report.

RECOMMENDATION E: The Defendant State of New Hampshire shall have no payment obligation beyond refunding, without interest, the Seabrook Tax collected by it less the amount of credit for the Business Profits Tax taken by each taxpayer.

Because of the special circumstances present in the case at bar, I recommend that the Court order neither postjudgment nor prejudgment interest on the amounts of the Seabrook Tax to be refunded by the State of New Hampshire.

There is precedent for the Court to award postjudgment interest in this original jurisdiction action, *see Texas v. New Mexico*, 482 U.S. 124, 132 n.8 (1987); and, as a matter of federal law, the Court in framing full retrospective relief between the State parties would be acting consistently with existing caselaw if it added prejudgment interest on the amounts to be refunded, for the purpose of compensating the injured parties for the loss of the time-value of their funds and putting them in the positions they would have occupied if New Hampshire had never adopted its unconstitutional scheme. *See West Virginia v. United States*, 479 U.S. 305, 310 (1987) ("Prejudgment interest is an element of complete compensation"). There is, however, no statute or binding precedent

that makes either type of interest an inevitable concomitant of a money judgment in an original jurisdiction action. In the case that comes closest to being on all fours with this one – *Maryland v. Louisiana*, 451 U.S. 725 (1981) (decision on the merits); 452 U.S. 456 (1981) (decree ordering refunds) – the revenues collected from the disputed Louisiana "first-use" tax had been placed in escrow, and the refund payees received only the interest earned on the escrowed funds. We have no escrow here, and none was ever sought.

In this original action between States, the three Plaintiff States (and not the Intervening Utilities) represent the electric ratepayers, both themselves and their citizens generally, who bear the ultimate burden of the unconstitutional tax. On the interest issue, I find it of critical significance that the Plaintiff States have never asked for the award of interest, whether postjudgment or prejudgment. In response to my specific question at the First Meeting of Counsel held on May 15, 1992, counsel for the Plaintiff States stated that they were not asking for an escrow of Seabrook Tax collections, "Not today, your Honor"; and that stance, acquiesced in by the Intervening Utilities and amici curiae, never changed. At no point in the extensive briefs they filed with me or in their oral argument before me that followed on December 8, 1992, did any of the Plaintiffs including the Plaintiff States even mention interest. Most significantly, after I on my own initiative had identified the interest question in the course of drafting a Proposed Decree, the Plaintiff States – Connecticut, Massachusetts and Rhode Island – responded to my inquiry by explicitly electing to take no position on the interest question. Thus, the ratepayers,

through their representatives, have declined to claim interest on the refunds.

Although the immediate recipients of the refunds are the Seabrook owners who paid the unconstitutional tax, the ratepayers represented by the three Plaintiff States are the ones who bear the ultimate burden of the Seabrook Tax and they are likewise the ones who are entitled to receive the ultimate benefit of the refunds and of any interest on the refunds. The Plaintiff States, however, both in their own proprietary capacities and in their parens patriae role for all other affected ratepayers, have, for whatever reason sufficient to themselves, decided not to press New Hampshire for interest. That, in my opinion, concludes the matter. The Seabrook owners are merely the conduit through which the refunds will ultimately redound to the benefit of ratepayers. The Plaintiff States, and not the five Seabrook owners that as Intervening Plaintiffs are the only parties now asking for interest on the refunds, call the litigation tune on behalf of the real parties in interest, the ratepayers.

In this suit between States the spur provided by postjudgment interest for prompt satisfaction of a money judgment is hardly necessary. Without that spur, the sovereign State of New Hampshire, we may assume, will comply fully with the Court's order to pay the refunds within 30 days – if the Court sees fit to adopt my recommendation. *See* Proposed Decree, Appendix D to the Final Report.

RECOMMENDATION F: If the Court awards interest on the refunds, it should set that interest, both postjudgment and prejudgment, at the rate prescribed by 28 U.S.C. § 1961.

I now turn to the second prong of the interest issue. In the event that the Court does not accept my recommendation adverse to the award of interest on the refunds, at what rate should interest be imposed?

Although 28 U.S.C. § 1961 by its terms applies only to judgments entered by district courts, there appears to be no good reason for crafting a different rule for cases between States in which the Supreme Court is the court of first instance, as well as of last instance. New Hampshire agrees that if a refund is ordered and if postjudgment interest is imposed, the rate prescribed by Section 1961 would be appropriate. By that statute postjudgment interest is computed "at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment." *Id.*; *see Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 838 (1990).

By its terms 28 U.S.C. § 1961 applies only to postjudgment interest on federal money judgments. Nonetheless, for the sake of convenience and of general fairness, I recommend that the very same single rate determined under Section 1961 (that is, the rate on United States Treasury bills immediately before the date of this Court's judgment) be used also for prejudgment interest. The

interest rates urged by the Intervening Utilities for prejudgment interest – namely, each Seabrook owner's cost of borrowing the lost funds at the various times involved – would require a complex accounting. Recognizing that fact, the Utilities have now suggested two alternatives, or surrogates. I reject the first – the rate of ten percent (10%) per year allowed by New Hampshire statute, N.H. Rev. Stat. Ann. § 21-J:28, for refunds of "any overpayment of taxes administered by the [D]epartment [of Revenue Administration]" – because it would not be fair to New Hampshire unless applied with conditions similar to those applied in paying interest on refunds under the New Hampshire statute; but that is not easy to do. It is, for example, far from clear that the ten percent (10%) rate on the refund is computed from the date of payment to the date of refund.[3] The Utilities' second alternative for prejudgment interest, however, does commend itself as both simple and fair. The use of the rate prescribed by 28 U.S.C. § 1961, if it is determined only once (i.e., as of the date of this Court's decree) is easy to apply and is apparently acceptable to the only parties seeking prejudgment interest.

Therefore, if the Court elects to order interest on the refunds, I recommend that in the Proposed Decree set forth as Appendix D to my Final Report the following be

---

[3] No interest is allowed under N.H. Rev. Stat. Ann. § 21-J:28 if the State pays the refund "within 3 months after the due date or authorized extension date or within 3 months after the return is filed[.]" New Hampshire's brief also asserts that, by an unchallenged administrative interpretation, interest on refunds is calculated from the date the taxpayer's tax return is filed, not the date the tax was paid.

substituted for the bracketed interest provision in line 1 on page D-2: [, with interest at an annual rate determined as of the date of this judgment in accordance with 28 U.S.C. § 1961, to run from each payment date of Seabrook Tax to the date of refund thereof,].

Respectfully submitted,

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February 1, 1993

Supreme Court, U.S.
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IN THE
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OCTOBER TERM, 1992

STATE OF CONNECTICUT, *et al.*,
Plaintiffs,
v.
STATE OF NEW HAMPSHIRE,
Defendant.

On Exceptions to the Final Report of the Special Master

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OCTOBER TERM, 1992

No. 119 Original

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Plaintiffs,

v.

STATE OF NEW HAMPSHIRE,
Defendant.

On Exceptions to the Final Report of the Special Master

EXCEPTIONS OF INTERVENORS TO THE FINAL REPORT OF THE SPECIAL MASTER

This case involves a challenge to the New Hampshire "Tax on Nuclear Station Property" (N.H. Rev. Stat. Ann. Ch. 83-D) (the "Seabrook Tax") and an accompanying credit for payment of that tax against liability for the New Hampshire Business Profits Tax (N.H. Rev. Stat. Ann. Ch. 77-A:5). Intervenors challenge these tax measures as violating the Commerce Clause of the United States Constitution, art. I, § 8, cl. 3, and the provisions of 15 U.S.C. § 391. The Special Master agreed that the tax and credit, operating together, are unlawful on both grounds. The Special Master concluded, however, that the Seabrook Tax by itself is valid. Final Report 19 n.11, 26 n.17. Intervenors except to the latter conclusion.[1]

---

[1] The plaintiffs are the States of Connecticut, Massachusetts, and Rhode Island. Intervenors are the United Illuminating Co., New England Power Co., Connecticut Light & Power Co., Canal Electric Co., Montaup Electric Co., and Taunton Municipal Lighting Plant. Intervenor The Connecticut Light and Power Company does not participate in this filing.

For purposes of Sup. Ct. R. 29.1, see the Motion for Leave to Intervene and accompanying Complaint of Intervenors.

A. The New Hampshire Legislature, seeking to address growing financial concerns, enacted the Seabrook Tax in 1991. 1991 N.H. Laws c. 354 (to be codified at N.H. Rev. Stat. Ann. (RSA), Chapter 83-D) (the "Seabrook Tax").[2] The Seabrook Tax is an *ad valorem* tax imposed upon "nuclear station property," defined by the statute as "the land, buildings, structures, tunnels, machinery, dynamos, apparatus, poles, wires, nuclear fuel and fixtures of all kinds and descriptions used in generating, producing, supplying and distributing electric power or light from the fission of atoms, exclusive of transmission lines." Ch. 83-D:2. It is undisputed that the Seabrook Nuclear Station is the only facility in the State subject to this tax. Stip. ¶¶ 3.2 & 3.3. In particular, no other facility generating electricity in the State is subject to this special tax. *Id.* ¶ 3.3.[3]

The revenues derived from the Seabrook Tax are considered part of the general revenues of the State, expendable on a current basis. Stip. ¶ 11.5. They are not accumulated, or otherwise segregated, in a special fund for future use; nor are they designated in any way for particular purposes. The State addresses concerns specific to Seabrook through other, additional measures: *e.g.*,

[2] At the same time, the Legislature provided that the Seabrook Tax would be an offset against liability for a second tax: the New Hampshire Business Profits Tax. 1991 N.H. Laws c. 354:2 (to be codified at RSA ch. 77-A:5, VI). Pursuant to the New Hampshire statutes, any payment of the Seabrook Tax may be taken as a credit, dollar-for-dollar, against tax owed on New Hampshire business profits. The effect of the Seabrook Tax thus varies with respect to each owner, according to the extent of New Hampshire business profits that it earns. We agree with the Special Master's conclusion that the tax and credit, which the Legislature declared nonseverable, are discriminatory in violation of both the Commerce Clause and 15 U.S.C. § 391.

[3] The Seabrook Nuclear Station, like other facilities generating electricity in New Hampshire, is subject to local property taxes. Stip. ¶ 3.3. No statewide property tax is imposed on other generating facilities. *Id.* ("Stip." refers to the stipulated record developed before the Special Master.)

it requires Seabrook owners to pay a nuclear decommissioning financing charge of more than $1.6 billion over the life of Seabrook station (Ch. 162-F:14 *et seq.*; Stip. ¶ 13.2), and to bear the costs of preparing, maintaining, and operating the State's emergency nuclear response program (Ch. 107-B). The revenues from the Seabrook Tax, by contrast, are not dedicated to similar purposes. In fact, a significant portion of those funds simply replace funds lost by the State when, in the same statute that imposed the Seabrook Tax, New Hampshire repealed its Franchise Tax insofar as it applied to (in-state) sales of electricity. 1991 N.H. Laws c. 354:3.

Whereas the burden of the Franchise Tax fell on the in-state sale of electricity, the Seabrook Tax, which replaced it, was enacted with the intended effect of imposing a special tax burden on out-of-state business. Thus, from the inception of the tax, considerably more than a majority share—and now almost all—of Seabrook has been owned by companies doing the lion's share of their business outside New Hampshire. Stip. ¶¶ 3.5-3.18. Only those businesses are subject to this special statewide property tax. The other facilities used to generate electricity in the State are not subject to this or any other statewide property tax; those facilities are owned overwhelmingly by companies doing the bulk of their business in New Hampshire. Stip. ¶¶ 6.15-6.19.

That the Seabrook Tax targets out-of-state interests for a special burden, far from being coincidental, is a primary reason for its enactment. As Rep. Hayes stated in support of the tax, "[i]t raises 22.4 million dollars per year in the first year, which is a net increase of 14 million dollars over what we would have received from the franchise taxes at the present time. Sixty-five per cent of this tax will be paid by out-of-state interests." Remarks of Rep. Robert Hayes, The N.H. House of Representatives Floor Debate Re: House Bill 64, April 2, 1991, pp. 25-26. Rep. Hayes went on to point out that,

taking into account the repeal of the franchise tax paid by local utilities, the entire net increase in taxes from the bill would be exported: "If you do the math to work this out, you'll see that over 14 million dollars is paid by out-of-state interests; and you can conclude that they are indeed are [sic] financing this increase in the utility taxes that we're going to pay." *Id.* *See* Addendum to Brief in Support of Motion for Leave to File Complaint 66A-70A (reprinting remarks).

B. This case was brought by the States of Connecticut, Massachusetts, and Rhode Island to challenge the Seabrook Tax, both by itself and in conjunction with the accompanying credit provision. Intervenors are six utilities who, as owners of Seabrook, pay the Seabrook Tax. Granted permission to intervene (112 S. Ct. 2961 (1992)), the utilities likewise challenged the Seabrook Tax, by itself and in conjunction with the credit provision. For somewhat different reasons, both challenges alleged that New Hampshire has discriminated against interstate commerce in electricity, in violation of the Commerce Clause and 15 U.S.C. § 391.

As relevant here, the Seabrook Tax by itself was attacked on the ground that New Hampshire had illegally singled out for a special tax burden the one electricity-generating facility that is predominantly engaged in interstate commerce: New Hampshire does not subject other (sometimes competing) electricity-generating facilities to *any* statewide property tax (while all generating facilities, including Seabrook, pay local property taxes). This discriminatory effect, moreover, was fully intended—indeed, was a prime object of the Legislature. And the actual use of the revenues raised by the Seabrook Tax shows that the unique burden is not justified by any legitimate local purpose. Because the purpose and effect of the Seabrook Tax were to discriminate against interstate commerce in electricity, intervenors argued, the tax violates the Commerce Clause and 15 U.S.C. § 391.

The Special Master rejected this legal conclusion, though he did not disagree with the showings of discriminatory effect or purpose. The Master simply explained: "It would be hard to say that New Hampshire did not have a reasonable basis for establishing different tax schemes for a nuclear plant, indeed the largest nuclear plant in New England, and fossil fuel and hydro plants." Final Report 26 n.17.

1. Intervenors except to the Special Master's conclusion that the Seabrook Tax is consistent with the Commerce Clause. Final Report 26 n.17.

2. Intervenors except to the Special Master's conclusion that the Seabrook Tax is consistent with 15 U.S.C. § 391. Final Report 19 n.11.

In support of the foregoing, intervenors submit the attached brief.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 119 Original

STATE OF CONNECTICUT, *et al.*,
Plaintiffs,

v.

STATE OF NEW HAMPSHIRE,
Defendant.

On Exceptions to the Final Report of the Special Master

BRIEF OF INTERVENORS IN SUPPORT OF EXCEPTIONS TO THE FINAL REPORT OF THE SPECIAL MASTER

JURISDICTION

The original and exclusive jurisdiction of this Court rests upon Article III, section 2, of the United States Constitution and upon 28 U.S.C. § 1251(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, art. I, sec. 8, cl. 3, states that "Congress shall have Power . . . To regulate Commerce . . . among the several States."

Section 391 of Title 15, U.S. Code, states:

> **Tax on or with respect to generation or transmission of electricity.** No State, or political subdivision thereof, may impose or assess a tax on or with re-

spect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

STATEMENT

This case involves a challenge to the New Hampshire "Tax on Nuclear Station Property" (N.H. Rev. Stat. Ann. Ch. 83-D) (the "Seabrook Tax") and an accompanying credit for payment of that tax against liability for the New Hampshire Business Profits Tax (N.H. Rev. Stat. Ann. Ch. 77-A:5). Intervenors challenge these tax measures as violating the Commerce Clause of the United States Constitution, art. I, § 8, cl. 3, and the provisions of 15 U.S.C. § 391. The Special Master agreed that the tax and credit, operating together, are unlawful on both grounds. The Special Master concluded, however, that the Seabrook Tax by itself is valid. Final Report 19 n.11, 26 n.17. Intervenors except to the latter conclusion.[1]

1. *Background.* In 1991, the New Hampshire Legislature, seeking to address growing financial concerns, replaced one tax with another designed to raise more money. It repealed its Franchise Tax insofar as it applied to (in-state) sales of electricity. 1991 N.H. Laws c. 354:3. The same statute then enacted a special property tax on "nuclear station property"—the Seabrook Tax. 1991 N.H. Laws c. 354 (to be codified at N.H. Rev. Stat. Ann. (RSA), Chapter 83-D).[2] *See* Addendum

[1] Intervenor The Connecticut Light and Power Company does not participate in this filing.

[2] Also in the same statute, the Legislature provided that the Seabrook Tax would be an offset against liability for a second tax:

to Brief in Support of Motion for Leave to File Complaint (reprinting statute).

The Seabrook Tax is an *ad valorem* tax imposed upon "nuclear station property," defined by the statute as "the land, buildings, structures, tunnels, machinery, dynamos, apparatus, poles, wires, nuclear fuel and fixtures of all kinds and descriptions used in generating, producing, supplying and distributing electric power or light from the fission of atoms, exclusive of transmission lines." Ch. 83-D:2. It is undisputed that the Seabrook Nuclear Station is the only facility in the State subject to this tax. Stip. ¶¶ 3.2 & 3.3. In particular, no other facility generating electricity in the State is subject to this special tax.

The tax is imposed at the rate of 0.64% of the value of the nuclear station property. Ch. 83-D:3. The 1991 Act itself set the maximum initial value of the Seabook Station at $3.5 billion, Ch. 83-D:9, but it provided for subsequent valuation by the commissioner of revenue administration. Ch. 83-D:4. The owners of Seabrook are liable for the tax in proportion to their relative shares of ownership of the facility. Ch. 83-D:5. Liability is several, not joint or joint and several. Stip. ¶ 3.5.

Each of the intervenors owns part of the Seabrook Nuclear Station. *See* Stip. ¶¶ 1.3-1.9.[3] The Seabrook Tax was imposed with an effective date of July 1, 1991, and

the New Hampshire Business Profits Tax. 1991 N.H. Laws c. 354:2 (to be codified at RSA Ch. 77-A:5, VI). Pursuant to the New Hampshire statutes, any payment of the Seabrook Tax may be taken as a credit, dollar-for-dollar, against tax owed on New Hampshire business profits. The effect of the Seabrook Tax thus varies with respect to each owner, according to the extent of New Hampshire business profits that it earns. We agree with the Special Master's conclusion that the tax and credit together, which the Legislature declared nonseverable, are discriminatory in violation of both the Commerce Clause and 15 U.S.C. § 391.

[3] A complete listing of Seabrook owners, and their respective shares of ownership, is set forth in the Stipulation at ¶¶ 3.6-3.18.

payments for 1991 were limited to one-half of the amount that would be due on an annual basis. Stip. ¶ 4.1; *see* Ch. 354:21 & 83:D-9. For that six-month period, the Seabrook owners as a whole paid approximately $11.2 million in Seabrook tax. Stip. ¶ 4.2. Intervenors' share amounted to roughly $4.26 million (38%). *Id.* Based on the expected valuation of Seabrook for 1992—just under $3.75 billion (Stip. ¶ 4.3)—the total Seabrook Tax payments for 1992 would be approximately $24 million (Stip. ¶¶ 4.4-4.7), of which intervenors' share would be $9.125 million (38%). *Id.* Owners of Seabrook are already passing on the Seabrook tax in wholesale and retail rates charged to their consumers. Stip. ¶¶ 5.5-5.20.

The revenues derived from the Seabrook Tax are considered part of the general revenues of the State, expendable on a current basis. Stip. ¶ 11.5. They are not accumulated, or otherwise segregated, in a special fund for future use; nor are they designated in any way for particular purposes. The State does address concerns specific to Seabrook through other, additional measures: *e.g.*, it requires Seabrook owners to pay a nuclear decommissioning financing charge of more than $1.6 billion over the life of Seabrook Station (Ch. 162-F:14 *et seq.*; Stip. ¶ 13.2), and to bear the costs of preparing, maintaining, and operating the State's emergency nuclear response program (Ch. 107-B). The revenues from the Seabrook Tax, in contrast, are not dedicated to similar purposes. In fact, a significant portion of those funds simply replace funds lost to New Hampshire by its repeal, in the same statute that imposed the Seabrook Tax, of the Franchise Tax on in-state sales of electricity. 1991 N.H. Laws c. 354:3.

Whereas the burden of the Franchise Tax fell on the in-state sale of electricity, the Seabrook Tax, which replaced it, has the immediate effect of imposing a special tax burden largely on out-of-state business. Thus, from the inception of the tax, considerably more than a majority share—and now almost all—of Seabrook (and hence

of the electricity produced at Seabrook) has been owned by companies doing the lion's share of their business outside New Hampshire. Stip. ¶¶ 3.5-3.18. The other facilities used to generate electricity in the State are not subject to the Seabrook Tax or to any other statewide property tax; and those facilities are owned overwhelmingly by companies doing the bulk of their business in New Hampshire. Stip. ¶¶ 6.15-6.19.[4]

That the Seabrook Tax imposes a special burden on out-of-state interests was far from unintended but, rather, was a primary reason for its enactment. Rep. Hayes, a key supporter, explained that the tax "raises 22.4 million dollars per year in the first year, which is a net increase of 14 million dollars over what we would have received from the franchise taxes at the present time. Sixty-five per cent of this tax will be paid by out-of-state interests." Remarks of Rep. Robert Hayes, The N.H. House of Representatives Floor Debate Re: House Bill 64, April 2, 1991, pp. 25-26. Rep. Hayes went on to point out that, taking into account the repeal of the Franchise Tax paid by local utilities, the entire net increase in taxes from the bill would be exported: "If you do the math to work this out, you'll see that over 14 million dollars is paid by out-of-state interests; and you can conclude that they are indeed are [*sic*] financing this increase in the utility taxes that we're going to pay." *Id. See Addendum* to Brief in Support of Motion for Leave to File Complaint 66A-70A (reprinting remarks).

2. *This Litigation.* This case was brought by the States of Connecticut, Massachusetts, and Rhode Island to challenge the Seabrook Tax, both by itself and in conjunction with the accompanying credit provision. This Court granted leave to file the complaint and referred the case to the Special Master. 112 S. Ct. 1756 (1992). The Court subsequently allowed intervention by six utili-

[4] The Seabrook Nuclear Station, like other facilities generating electricity in New Hampshire, is subject to local property taxes. Stip. ¶ 3.3.

ties who, as owners of Seabrook, pay the Seabrook Tax. 112 S. Ct. 2961 (1992). Intervenors likewise challenge the Seabrook Tax both by itself and in conjunction with the credit provision. Both challenges allege (though for somewhat different reasons) that New Hampshire has discriminated against interstate commerce in electricity, in violation of the Commerce Clause and 15 U.S.C. § 391.

As relevant here, the Seabrook Tax by itself is attacked on the ground that New Hampshire has illegally singled out for a special tax burden the one electricity-generating facility that is predominantly engaged in interstate commerce: New Hampshire does not subject other (sometimes competing) electricity-generating facilities to the Seabrook Tax or to any other statewide property tax (while all generating facilities, including Seabrook, pay local property taxes). This discriminatory effect, moreover, was fully intended by—indeed, was a prime objective of—the Legislature. And the actual use of the revenues raised by the Seabrook Tax shows that the unique burden is not tied to, or justified by, any legitimate local purpose. Because the purpose and effect of the Seabrook Tax are to discriminate against interstate commerce in electricity, the tax violates the Commerce Clause and 15 U.S.C. § 391.

Under the Special Master's direction, the parties developed a stipulated record for decision on these claims. After briefing and argument, the Special Master agreed that the Seabrook Tax and the credit provision, operating *together*, are invalid on both constitutional and statutory grounds. Final Report 17-38. In a single brief footnote, however, the Master rejected the challenge to the Seabrook Tax itself, citing *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 624-25 (1981), and *Nordlinger v. Hahn*, 112 S. Ct. 2326 (1992). Without disputing the showings of discriminatory effect or purpose, the Master simply stated: "It would be hard to say that New Hampshire did not have a reasonable basis for establishing different tax schemes for a nuclear plant, indeed the

largest nuclear plant in New England, and fossil fuel and hydro plants." Final Report 26 n.17 (rejecting Commerce Clause challenge). *See also* Final Report 19 n.11 (rejecting statutory challenge for same reason). Intervenors except to these conclusions.

SUMARY OF ARGUMENT

Although States have broad latitude in classifying property for purposes of taxation, *see, e.g., Nordlinger v. Hahn*, 112 S. Ct. 2326 (1992), the Commerce Clause —and, with respect to the generation of electricity, 15 U.S.C. § 391—limits the power of a State to discriminate against enterprises engaged in interstate, as opposed to intrastate, commerce. *See, e.g., American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987). Thus, while interstate commerce may be required to pay its own way, *see Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 288-89 (1977), a State is not free to single out, for peculiarly burdensome taxation, operations wholly or primarily serving interstate commerce, at least without demonstrating that the added taxation is designed to compensate for some special burdens attributable to those operations.

That singling out, however, is precisely what occurred with enactment of the Seabrook Tax. That tax is imposed on a single facility—one that, as the Legislature was well aware, was owned predominantly by "out-of-state interests." Other generating facilities, owned predominantly by local interests, are not subject to the Seabrook Tax or, indeed, any state-wide property tax. And, while it is true that the Seabrook Nuclear Station is the only nuclear facility in New Hampshire, the record belies any attempt to suggest that the tax is meant to compensate for unusual burdens occasioned by nuclear power: rather, the tax is a general revenue measure, expended on a current basis to replace revenues lost by repeal of the state Franchise Tax on electricity and to fund

other, ongoing state programs. In short, the tax is just what it was meant to be: a measure crafted to support overall state activities by singling out a facility primarily serving interstate commerce. As such, it violates both the Commerce Clause and 15 U.S.C. § 391.

ARGUMENT

The Special Master correctly recognized one obvious respect in which the New Hampshire tax scheme is discriminatory. By crediting payment of one New Hampshire tax (the Seabrook Tax) against payment of a second New Hampshire tax (the Business Profits Tax), the State has favored companies doing substantial business in New Hampshire over companies doing equivalent business in other States. This Court has repeatedly struck down, on both constitutional and statutory grounds, just such efforts by States to protect businesses conducting in-state activities from multiple taxation, while leaving businesses conducting interstate activities at risk for multiple taxation. *See Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 483 U.S. 232 (1987) (Commerce Clause); *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987) (Commerce Clause); *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984) (Commerce Clause); *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984) (Commerce Clause); *Maryland v. Louisiana*, 451 U.S. 725 (1981) (Commerce Clause); *Arizona Pub. Serv. Co. v. Snead*, 441 U.S. 141 (1979) (15 U.S.C. § 391).

The Master failed to recognize, however, that the New Hampshire scheme is discriminatory in another respect as well. Even without regard to the credit provision, New Hampshire has improperly singled out a generating facility primarily serving interstate commerce for a tax not imposed on generating facilities serving local commerce, or indeed on any other facility in the State. This deliberate use of a general revenue measure—not tied to any unusual financial outlays by the State—to discriminate against interstate activities likewise violates both

the Commerce Clause and the provisions of 15 U.S.C. § 391.[5]

I. THE SEABROOK TAX DISCRIMINATES IN FAVOR OF LOCAL COMMERCE IN VIOLATION OF THE COMMERCE CLAUSE

A. It is, by now, well-established as a "central tenet that the Commerce Clause 'by its own force created an area of trade free from interference by the States.'" *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. at 280 (quoting *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328 (1977)). Although States may impose taxes on businesses engaged in interstate trade, those taxes must meet standards of fairness and neutrality. In recent years, the Court has required state tax measures to satisfy a four-part test: a state tax is lawful under the Commerce Clause only if "the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977); *see Goldberg v. Sweet*, 488 U.S. 252, 260 (1989).

This challenge involves the third requirement: that a state tax "not discriminate against interstate commerce." "This antidiscrimination principle 'follows inexorably from the basic purpose of the Clause' to prohibit the multiplication of preferential trade areas destructive of the free commerce anticipated by the Constitution." *Maryland v. Louisiana*, 451 U.S. at 754 (quoting *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. at 329). As one commentator has noted, "[t]he Supreme Court has traditionally recognized that a large part of the

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[5] We address the Commerce Clause issue first, largely because the relevant constitutional principles have been more fully developed in case law than the principles governing 15 U.S.C. § 391. *Cf. Commonwealth Edison Co. v. Montana*, *supra* (addressing Commerce Clause challenge before statutory challenge).

rationale for granting Congress control over interstate commerce 'was to insure . . . against discriminating State legislation.'" L. Tribe, *American Constitutional Law* § 6-17, at 453 (2d ed. 1988) (quoting *Welton v. Missouri*, 91 U.S. (1 Otto) 275, 280 (1875)).

This Court has reaffirmed, moreover, that the constitutional prohibition is not limited to discrimination that appears on the face of the state tax measure. Thus, as the Court recently observed in striking down a facially neutral "flat tax," "the Commerce Clause has a deeper meaning that may be implicated even though state provisions . . . do not allocate tax burdens between insiders and outsiders in a manner that is facially discriminatory." *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. at 281 (footnote omitted); *Nippert v. Richmond*, 327 U.S. 416, 425-26 (1946); *see* L. Tribe, *supra*, § 6-17, at 455-56. The Commerce Clause bars discrimination, "whatever its form or method, . . . when state legislation nominally of local concern is in point of fact aimed at interstate commerce, or by its necessary operation is a means of gaining a local benefit by throwing the attendant burdens on those without the state." *South Carolina State Highway Dep't v. Barnwell Brothers, Inc.*, 303 U.S. 177, 185-86 (1938).

The reason for scrutinizing even facially neutral measures is not hard to fathom. It is the actual effect on interstate commerce (compared with intrastate commerce) that threatens the constitutional "guarantee of a free trade area among States" (*American Trucking Ass'ns*, 483 U.S. at 281); and the constitutional evil is present whether or not the state legislature has found a way to obscure its discriminatory aims and effects. Likewise, the concern repeatedly identified as underlying the need for constitutional scrutiny—the absence of normal political restraints to prevent exploitation of interests not fully represented in the state legislature—exists whether

or not legislative discrimination appears on the face of the statute.[6]

In fact, this Court has expressed particular concern about narrowly targeted taxes, because such taxes "are easily tailored to single out interstate business and subject them to effects forbidden by the Commerce Clause." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. at 288 n.15. Observing that such taxes could take various forms —including property taxes—the Court said that "[a]ny tailored tax of this sort creates an increased danger of error in apportionment, *of discrimination against interstate commerce*, and of a lack of relationship to the services provided by the State." 430 U.S. at 288 n.15 (emphasis added). Given those dangers, the Court concluded, "[a] *tailored* tax, however accomplished, must receive the careful scrutiny of the courts to determine whether it produces a forbidden *effect* on interstate commerce." 430 U.S. at 288 n.15 (emphasis added).

B. If "careful scrutiny" is given to the Seabrook Tax, it is apparent that just such a singling out of interstate commerce, with discriminatory effects and a discriminatory purpose, has occurred in New Hampshire. The Nuclear Station Property Tax is a tax imposed on one facility, and only one facility: the Seabrook Nuclear Station. Moreover, at the time of enactment of the Seabrook Tax (and ever since), companies doing the bulk of their business outside of New Hampshire, including intervenors, have owned considerably more than a ma-

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[6] "Unrepresented interests will often bear the brunt of regulations imposed by one State having a significant effect on persons or operations in other States. Thus, 'when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state.' *South Carolina State Highway Dept. v. Barnwell Brothers, Inc.*, 303 U.S. 177, 185, n.2 (1938); *see also Southern Pacific Co. v. Arizona*, 325 U.S. at 767-768, n.2." *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 92 (1984).

jority share of Seabrook.[7] *See also* Stip. ¶¶ 6.7-6.14. There are other facilities used to generate electricity within New Hampshire, but those facilities pay neither the Seabrook Tax nor any other statewide property tax.[8] And those facilities are owned overwhelmingly by companies that do the bulk of their business in-state (Stip. ¶¶ 6.15-6.19)—and that compete in the wholesale market with intervenors (*see* Stip. ¶ 5.1). Beyond question, then, the Seabrook Tax " 'is of such a character that its burden falls principally upon those without the state.' " *South-Central Timber*, 467 U.S. at 92 (quoting *Barnwell*, 303 U.S. at 185 n.2).

The fact that the Seabrook Tax falls largely on out-of-state interests is not happenstance, but, in fact, a primary reason for its enactment. Representative Hayes, the chairman of the legislative subcommittee that drafted the tax measure, stated in support of the tax: "It raises 22.4 million dollars per year in the first year, which is a net increase of 14 million dollars over what we would have received from the franchise taxes at the present time.[9] Sixty-five per cent of this tax will be paid by out-of-state interests." Remarks of Rep. Robert Hayes, The N.H. House of Representatives Floor Debate Re: House Bill 64, April 2, 1991, pp. 25-26. Rep. Hayes went on to point out that, taking into account the repeal of the franchise tax paid by local utilities, the entire net increase in taxes from the bill would be exported: "If you do the math to work this out, you'll see that over 14 million dollars is paid by out-of-state interests; and you can

[7] The figure at the time of enactment was approximately 62%. Stip. ¶¶ 3.5-3.18. The acquisition of Public Service Company of New Hampshire (PSNH) by Northeast Utilities, and the transfer of its Seabrook interest to North Atlantic Energy Co., have raised that figure to close to 98%.

[8] Those facilities, as well as Seabrook, are subject to local property taxes. Stip. ¶ 3.3.

[9] The Act imposing the Seabrook Tax repealed the franchise tax on sales of electricity. *See* page 2, *supra*.

conclude that they are indeed are [sic] financing this increase in the utility taxes that we're going to pay." *Id.*

The discrimination against interstate commerce in electrictly thus not only is apparent from the inherent restriction of the Seabrook Tax to Seabrook, but is confirmed by the legislative history. A central concern of the New Hampshire legislature was to ensure that local interests would feel little or no effect from the tax package as a whole. Indeed, as Representative Hayes explained, the amount of the Seabrook Tax was deliberately set so that the excess of the new tax over the repealed Franchise Tax would largely be paid by out-of-state interests. Of course, if every State pursued such a course, the result would inevitably be an escalating series of retaliatory measures, with each State seeking to embrace for itself (in the words of Representative Hayes) "the New Hampshire tradition of finding some way for the other fellow to pay." N.H. Floor Debate, *supra*, at 25-26.

Although it is true that the Seabrook Tax is even-handed in one sense—*i.e.*, that each owner pays tax at the same rate regardless of whether it serves interstate or intrastate commerce—the statute nonetheless works (as was intended) an overall discrimination against interstate commerce. It would plainly offend the Commerce Clause for a State to place two-thirds of its tax burden on interstate commerce by imposing a four percent tax on generating plants used for intrastate business and an eight percent tax on generating plants used for interstate business. Yet the statute at issue here, while admittedly less overt, has much the same effect. As this Court has pointed out, the fact that a State makes its discrimination more subtle, or less absolute, does not mean that it is free of constitutional restraints. *See Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 483 U.S. at 248 ("[t]he fact that [a] tax has the advantage of appearing nondiscriminatory . . . does not save it from invalidation") (internal quotes omitted). To impose unique bur-

dens on a particular property owned largely by interstate businesses, rather than exclusively by interstate businesses, is less discriminatory, but it is discriminatory nonetheless. See *American Trucking Ass'ns v. Scheiner*, 483 U.S. at 286-87 (striking down discriminatory flat tax scheme even though some out-of-state companies fared better than some in-state companies under the scheme).

It is, in the end, the narrowness of the classification—one property—that makes the New Hampshire tax particularly subject to manipulation and, thus, particularly suspect as a constitutional matter. Unlike a broad-based tax, such as an income tax, that is applicable to a wide, largely indeterminate class of residents and non-residents alike, the Seabrook Tax focuses on one property and does so *because* that focus produces a special burden on out-of-state interests. When the actual purpose, and specific effect, of such a tax is to reach distinctively out-of-state commerce, the tax should be declared invalid.

C. The Special Master rejected this conclusion. Final Report 26 n.17. The Master cited two cases and gave one reason for his recommendation on this issue. But neither the cases nor the rationale is sufficient to validate the Seabrook Tax.

One of the authorities cited by the Special Master, *Nordlinger v. Hahn*, 112 S. Ct. 2326 (1992), sheds little light on the issue presented here. Not only did that case involve only the Equal Protection Clause, not the Commerce Clause, but the Court expressly declined to consider any claim of discrimination between in-state and out-of-state taxpayers, noting that the sole plaintiff lived *in-state* and thus could not assert any infringement of the right of interstate travel. Although the Court in *Nordlinger* did say that States have much leeway in classifying property for purposes of taxation, that uncontroversial principle provides only a starting point for the question here: whether, notwithstanding that principle,

the Commerce Clause prevents States from subjecting interstate commerce to taxes that are discriminatory in purpose and effect.

The other case cited by the Special Master, *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), is more relevant, but still ultimately beside the point. In *Commonwealth Edison* this Court upheld the Montana severance tax on coal against a Commerce Clause challenge based solely on the fact that most of the coal was shipped out of the State. Had New Hampshire simply levied a uniform tax on all electrical generating plants, and the electricity produced largely traveled out of state, its statute would have been the same as the Montana statute; but New Hampshire did not do so. Its statute—targeting the sole plant used primarily in interstate commerce—is thus more akin to a hypothetical Montana statute that singled out a particular coal mine, simply because the coal from that mine, unlike other coal, was sold in interstate commerce. That is very different from the statute actually before the Court in *Commonwealth Edison*, pursuant to which Montana had taxed *all* severance of coal and done so for a legitimate local reason—to compensate the State for diminution of an important natural resource—wholly independent of any purpose to discriminate against interstate commerce. Thus, *Commonwealth Edison* holds only that the mere fact that a tax falls predominantly on interstate commerce does not invalidate it. *Cf. Exxon Corp. v. Maryland*, 437 U.S. 117 (1978). That holding does not save a tax, like the Seabrook Tax, that deliberately singles out out-of-state interests for a special burden not imposed on comparable (and competing) in-state interests.[10]

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[10] This Court, in upholding property taxes as applied to interstate businesses, has repeatedly stressed that the taxes in such cases were equivalent to the property taxes imposed on intrastate businesses. *See, e.g., Cleveland C., C. & St. L. Ry. v. Backus*, 154 U.S. 439 (1894); *Postal Telegraph Cable Co. v. Adams*, 155 U.S. 688 (1895); J. Hellerstein & W. Hellerstein, *State and Local Taxation* 261-62 (5th ed. 1988).

Beyond precedent, the Special Master explained only: "It would be hard to say that New Hampshire did not have a reasonable basis for establishing different tax schemes for a nuclear plant, indeed the largest nuclear plant in New England, and fossil fuel and hydro plants." Final Report 26 n.17. To the extent that this explanation rests on the notion that States are not always disabled from imposing taxes that fall more heavily on interstate than intrastate commerce, we agree: States clearly could impose additional tax burdens in order to compensate for some exceptional costs attributable to such activities, so that they are imposed not "because of" but "in spite of" their effects on interstate commerce. *Cf. Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979). But, as explained, discriminatory *effects* trigger constitutional suspicion, and the inquiry must turn to the reasons for those effects. The statement of the Special Master, then, must mean that the constitutional challenge is properly rejected by presuming a "reasonable"—*i.e.*, a legitimate, nondiscriminatory—purpose for the Seabrook Tax. A mere presumption of that sort, however, will not suffice in the face of the compelling evidence that the Seabrook Tax was adopted precisely "because of" Seabrook's out-of-state ownership.

A closer look at the New Hampshire tax scheme makes clear that the Seabrook tax is not targeted to solve any unusual problem traceable to Seabrook: notwithstanding the recitations in its "Declaration of Purpose and Findings," Ch. 83-D:1, the Seabrook Tax is, on its face and in its actual operation, nothing more than a general revenue measure. Revenues from the tax, like revenues from most taxes, are collected and expended on an annual basis; the State does not accumulate the funds, segregate them, or apply them to any particular purpose. Nor is the amount of the tax—$22 million in the first year—tied in any way to some identified burden imposed by the Seabrook facility on the State of New Hampshire. This lack of correlation is underscored by the fact that much

of the tax (roughly $8 million, *see* N.H. Floor Debate, at 25-26), far from being necessitated by added costs attributable to Seabrook, was raised merely to replace revenues lost by repeal of the Franchise Tax on local sales of electricity. And there is no basis for thinking, in the absence of evidence to the contrary, that the remaining revenues (roughly $14 million) are somehow linked to specific state expenditures resulting from operation of Seabrook. Rather, the tax is precisely what it seems to be: a measure designed to rund general state programs by singling out a facility primarily serving interstate commerce. As such, it violates the Commerce Clause.

II. THE SINGLING OUT OF SEABROOK FOR SPECIAL TAXATION VIOLATES FEDERAL LAW (15 U.S.C. § 391)

The principles just discussed apply with even greater force with respect to the unambiguous prohibitions of Section 391. That statute prohibits "discrimina[tion] against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity," and it classifies as discriminatory any tax that "results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce."[11] A tax purposely singling out a generating facility owned primarily by "out-of-state" interests falls comfortably within those terms.

What New Hampshire has done is to divide generating facilities into two categories. In the first category, it has placed those generating facilities primarily serving New Hampshire customers; it has subjected those facilities to local property taxes and not a state property tax. In the second category, New Hampshire has placed a single gen-

[11] The statute specifically deals with taxes "on or with respect to the generation or transmission of electricity." As the Special Master concluded, the Seabrook Tax readily comes within that description. Final Report 18-19.

erating facility primarily serving out-of-state customers; it has subjected that one facility to local property taxes *and* a state property tax. That difference in treatment necessarily means that, on the whole, electricity sold in the interstate market bears "a greater tax burden" than electricity sold within the State.

As with the analysis under the Commerce Clause (*see* page 13, *supra*), the fact that the categories are not absolute—*i.e.*, only intrastate electricity in the favored class and only interstate electricity in the disfavored class —does not mean that they are established on a nondiscriminatory basis. The language of Section 391 makes clear that the relevant inquiry is not limited to the face of the statute but must take into account the *effects* of the tax at issue. The issue is not whether the tax appears to be neutral but whether, below the surface, it "results, either directly or indirectly, in a greater tax burden" for electricity sold in interstate commerce. The Seabrook Tax, enacted with interstate producers and consumers in mind, imposes just such a burden.

Finally, the discrimination practiced by the Seabrook Tax cannot be justified simply by making vague references to concerns about nuclear power. In the first place, it is by no means clear that Section 391, as opposed to the Commerce Clause (*see* pages 14-15, *supra*), allows a State to defend its decision to place a greater tax burden on electricity sold in interstate commerce: the statute says that "[n]o state . . . may impose or assess" a discriminatory tax, not that a State may impose a discriminatory tax provided that it has a satisfactory explanation for doing so. But, in any case, the State has given no satisfactory explanation. The State did not identify particular problems caused by Seabrook, and then commit the $22 million raised by the Seabrook Tax to redress them; instead, it has simply collected and spent the revenues (including as much as $8 million to replace revenues from the repealed Franchise Tax) on general state programs.

This lack of connection between the tax and specific state burdens is even more striking when viewed in contrast to other state obligations imposed on Seabrook owners. For example, the State requires the owners to pay a nuclear decommissioning financing charge to the State, Ch. 162-F:14 *et seq.*, which is *not* mingled with general state revenues or expended for general state programs on a current basis. *See* Stip. ¶ 13.2. Furthermore, the owners must pay the cost of preparing, maintaining, and operating an emergency nuclear response program for the State. Ch. 107-B. If any justification for discrimination were allowed under Section 391, it is only that sort of specific, targeted financing measure that might pass muster. The Seabrook Tax is wholly different; it is a general revenue measure, nothing more.

CONCLUSION

The Court should enter judgment for intervenors and against the defendant on their claims under the Commerce Clause and Section 391.

Respectfully submitted,

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OCTOBER TERM, 1991

STATE OF CONNECTICUT,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,

PLAINTIFFS,

v.

STATE OF NEW HAMPSHIRE

DEFENDANT.

ON THE REPORT OF THE SPECIAL MASTER
OF DECEMBER 30, 1992

EXCEPTIONS OF THE STATE OF NEW HAMPSHIRE AND BRIEF IN SUPPORT OF EXCEPTIONS

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DEFENDANT.

ON THE REPORT OF THE SPECIAL MASTER
OF DECEMBER 30, 1992

EXCEPTIONS OF THE STATE OF NEW HAMPSHIRE

The State of New Hampshire, the Defendant herein, excepts to each of Recommendations A through D in the Special Master's Final Report dated December 30, 1992.

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ON THE REPORT OF THE SPECIAL MASTER
OF DECEMBER 30, 1992

BRIEF FOR THE STATE OF NEW HAMPSHIRE IN SUPPORT OF EXCEPTIONS

QUESTIONS PRESENTED

1. Whether this case remains appropriate for the exercise of the Court's original jurisdiction. (Exception to Recommendation A.)
2. Whether the record establishes that the New Hampshire Tax on Nuclear Station Property statute violates 15 U.S.C. 391 and is therefore invalid under the Supremacy Clause of the United States Constitution (Exception to Recommendation B.)
3. Whether the record establishes that the New Hampshire Tax on Nuclear Station Property statute is invalid under the Commerce Clause of the United States Constitution. (Exception to Recommendation C.)
4. Whether, if the New Hampshire Tax on Nuclear Station Property statute is invalid, a refund of all property taxes paid less the credits taken against the New Hampshire Business Profits Tax is the proper remedy. (Exception to Recommendation D.)

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JURISDICTION

The motion for leave to file a complaint invoking the original jurisdiction of this Court was granted on January 27, 1992. The complaint alleges that this Court has jurisdiction under the Constitution of the United States, Article III, Section 2, Clauses 1 and 2, and 28 U.S.C. 1251(a)(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article 1, section 8, clause 3 of the constitution of the United States provides as follows:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes.

Article VI, clause 2 of the Constitution of the United States provides as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

Article III, section 2, clause 3 of the Constitution of the United States provides as follows:

> In all Cases . . . in which a State shall be a Party, the supreme Court shall have original Jurisdiction.

The Eleventh Amendment of the Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, com-

menced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Title 28 U.S.C. §1251(a) provides:

(a) The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

Title 15 U.S.C. §391 provides as follows:

Tax on or with respect to generation or transmission of electricity. No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

New Hampshire's "Tax on Nuclear Station Property," Chapter 354 (H.B. 63 § 1) of the 1991 New Hampshire Laws, is set out in full in Exhibit A to the Plaintiff States' Complaint and is codified as New Hampshire Rev. Stat. Ann. 83-D.

New Hampshire's "Business Profits Tax," New Hamp. Rev. Stat. Ann. 77-A:5, prior to amendment by Chapter 354 (H.B. 64 § 2) of 1991 New Hampshire Laws, is contained in the Addendum to the Plaintiff States' Brief in Support of Motion for Leave to File Complaint.

STATEMENT

A. Introduction and Summary

In this case, the Commonwealth of Massachusetts and the States of Rhode Island and Connecticut challenge New Hampshire's Nuclear Station Property Tax statute that was enacted in 1991 after New Hampshire's first nuclear reactor — Seabrook Station — went into service. The Plaintiff States sought leave to file their complaint, contending that the burden of New Hampshire's new tax "will ultimately be borne disproportionately by non-New Hampshire consumers, and thus this tax will provide substantial and direct commercial advantage to local businesses and consumers." Complaint ¶29 A. This Court granted leave to file the Complaint and appointed Vincent L. McKusick to serve as Special Master.

Judge McKusick issued his Final Report on December 30, 1992. The Report notes that the Plaintiff States "contended before this Court that in-state consumers effectively were exempt from the Seabrook Tax while out-of-state consumers bore its brunt." Final Report at 15. But the Report finds that this contention was incorrect because the record shows that "customers in New Hampshire have borne as much of the burden of the Seabrook Tax as those in the Plaintiff States." Final Report at 16. Nonetheless, Judge McKusick recommends (1) that this Court continue to treat the case as if it involved a controversy between two or more states and (2) declare the Nuclear Station Property Tax statute to be invalid.

The Report concludes that the property tax itself is not violative of the Commerce Clause. Final Report at 26 n.17. Under the property tax, New Hampshire has collected approximately $11.2 million for the last six months of 1991 and about $22.4 million for 1992, or a total of more than $33 million. All of this revenue, according to the Report, could have been collected and retained by New Hampshire *if* it had not made the mistake of

allowing payments of the Nuclear Station Property Tax to be credited against the taxpayer's obligation to pay New Hampshire's business profits tax. The only constitutional or statutory defect the Report identifies is the decision to allow the credit to be taken.

The total credits claimed by all payers of the Nuclear Station Property Tax on tax returns filed to this date aggregate $1,470,620. Stipulation ¶¶ 7.10, 7.15, 7.33 and 7.40. These credits were not claimed by the New Hampshire owners of Seabrook Station because they had no taxable income against which a credit could be applied. The total credits were claimed by four of the interstate utilities that intervened in this case contending that the credit discriminated against them.

Having concluded that New Hampshire's statute should be invalidated, the Report observes that this Court has tended "to allow States the initial chance to correct the offending tax system." Final Report at 42. And, indeed, if the credit constitutes a defect in New Hampshire's system, it could no doubt be eliminated by the New Hampshire legislature, retroactive to the date the tax was imposed. The result would be the collection of $1,470,620 of business profits taxes from the four out-of-state owners who claimed the credit on their 1991 business profits tax returns and, when 1992 returns are filed, collection of whatever business profits taxes are due from Seabrook owners without the allowance of a Nuclear Property Tax credit.

Despite the ease with which the credit could be removed and Judge McKusick's recognition that this Court's decisions permit states to effect such corrections, the Final Report recommends that New Hampshire be denied its opportunity to remedy the defect. Instead, the Report recommends that New Hampshire be required to refund all of its property tax receipts since the statute was enacted. If this Court were to accept this conclusion, New Hampshire's $1.4 million credit in favor of the out-of-state owners of Seabrook would cause it to forfeit more than

$33 million of property tax revenue that Judge McKusick's Report makes clear New Hampshire had the right to collect. The decisions of this Court require no such result.

The unfairness of the Report's recommendation is even more apparent because the credit against the business profits tax does not present the same statutory or constitutional problems that have invalidated state tax credits in the few cases cited by the Plaintiff States and relied on by the Special Master. The amount of the credit is determined in a neutral way that does not favor one taxpayer over another, either based on state of domicile, the level of business activity in New Hampshire, or any other basis. This Court in *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 406 n.12 (1984), emphasized that "it is not the provision of the credit that offends the Commerce Clause, but the fact that it is allowed on an impermissible basis . . . ." All that the Plaintiff States have proven and the only thing that the Report identifies is that a credit against an income tax will benefit taxpayers with more taxable income allocable to New Hampshire more than it will benefit those with less taxable income allocable to New Hampshire. But the same situation confronted the *Westinghouse* Court, which clearly stated that it is not the provision of a credit that violates the Commerce Clause; it is only the allowance of a credit on an impermissible basis that presents a constitutional problem. Under this and other authorities, the credit provided by New Hampshire's Nuclear Station Property Tax statute, which actually has benefitted only out-of-state interests, does not violate the Commerce Clause or 15 U.S.C. § 391.

B. New Hampshire's Experience With Nuclear Power — The Seabrook Nuclear Power Station

The tax on Nuclear Station Property was imposed because, once Seabrook Nuclear Power Station went into service in the

summer of 1990, — i.e., went "on-line" — it presented significant new burdens and risks for New Hampshire. Not only was Seabrook the first and only nuclear power plant in the state, but it was the largest in New England. Because New Hampshire ultimately bears responsibility for assuring the safety and health of its residents, the commencement of operations at Seabrook required a level of emergency planning and preparedness that had been unnecessary when the state relied entirely on conventional generating plants. Moreover, it posed a risk which had not been presented by non-nuclear plants — the risk that the State of New Hampshire might be required to finance the extraordinary costs of a nuclear incident or other events that could lead to an early "decommissioning" of Seabrook. Stipulation ¶¶ 13.1, 13.9. The indirect impact of such an incident on the economy of the state, its tourist industry and its population, although impossible to quantify, posed an even greater threat to, and challenge for, state government. All of these burdens and risks had not existed in the pre-nuclear era in New Hampshire, but they were squarely presented by going on-line.

Going on-line was an important event for an additional reason. The construction and operation of an electric generating plant of any type is a major economic endeavor, particularly in a relatively small state. But the opening of New England's largest nuclear power plant was unquestionably the most significant economic event in the state in years. Nothing could compare with it. That it led to the imposition of a tax on the owners of this massive new generating plant is understandable and appropriate.[1]

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[1] The Seabrook plant is owned by a consortium of utilities, collectively known as "the joint owners." The joint owners are: The United Illuminating Company, New England Power Company, Connecticut Light and Power Company, Canal Electric Company, Montaup Electric Company, Taunton Municipal Lighting Plant, Massachusetts Municipal Wholesale Electric Co-

The real and potential economic burdens presented by Seabrook did not begin in the summer of 1990. For nearly 15 years, New Hampshire had been struggling with the special financial issues and public safety concerns presented by the construction of a major nuclear reactor in the state. The Nuclear Regulatory Commission issued a construction permit for Seabrook Station in 1976. Stipulation ¶ 3.19. The issuance of the permit was only the beginning of a long and costly process leading to the opening of Seabrook. As one of the Intervening Utilities explained, the development of a nuclear power plant is a difficult and controversial endeavor because "[t]here is widespread concern about the safety of nuclear generating plants and extensive public controversy concerning the further development of nuclear energy in the United States." Stipulation Attachment A § 3.

The difficulties encountered in efforts to develop nuclear power plants were described by another intervenor's parent corporation as being significant.

> Nuclear units in the United States have been subject to widespread criticism and opposition. Some nuclear projects have been canceled following substantial construction delays and cost overruns as the result of licensing problems, unanticipated construction defects and other difficulties. Various groups have by litigation, legislation and participation in administrative proceedings sought to prohibit the completion and operation of nuclear units and the disposal of nuclear waste.

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operative, the Town of Hudson (Massachusetts) Light and Power Department, EUA Power Company, Vermont Electric Generation & Transmission Cooperative and North Atlantic Energy Corporation (holder of the interest previously owned by Public Service Company of New Hampshire).

Stipulation Attachment A § 4. The development of Seabrook encountered all of these difficulties and more. In the words of another joint owner in December,1990, "[t]he licensing of Seabrook Unit I was plagued by lengthy delays and continues to be opposed by a number of intervening groups who have participated actively in administrative proceedings, filed numerous lawsuits and demonstrated at the construction site." Stipulation ¶ 13.4.

The financial impact of Seabrook on New Hampshire is illustrated by another chain of events — the decline and ultimate bankruptcies of the New Hampshire utilities that participated in the construction of Seabrook. As a result of the tremendous costs associated with the project, Public Service Company of New Hampshire ("PSNH"), went from owning 50% of the project to owning slightly more than 35% of Seabrook at the time it filed for protection under Chapter 11 of the Bankruptcy Code on January 28, 1988. Stipulation ¶ 3.6. In November, 1989 Northeast Utilities ("NU") negotiated the acquisition of PSNH and, after all regulatory approvals were received, PSNH and NU merged on June 5, 1992. Stipulation ¶ 3.6. The non-profit New Hampshire Electric Cooperative ("the New Hampshire Co-op"), another owner, followed with a Chapter 11 filing on May 6, 1991. Stipulation ¶ 14.5. The only other New Hampshire corporation owning an interest in Seabrook — EUA Power Corporation ("EUA Power") — also resorted to a bankruptcy filing in February, 1991. Stipulation Attachment A § 3.

The Seabrook project so crippled PSNH, New Hampshire's principal electric utility, and EUA Power that they provided no business profits tax revenue for the state. For the last six years of its separate existence, PSNH incurred losses and paid no business profits taxes to New Hampshire. Stipulation ¶ 17.1. EUA Power paid no business profits taxes either, filing returns from 1987 through 1990 reporting losses and no tax liability. Stipulation ¶ 17.1. Because the New Hampshire Co-op is not organized for gain or profit, it also paid no business profits

taxes. Stipulation ¶ 7.1. In the one year for which the New Hampshire Co-op filed a Business Profits Tax information return, it too reported a sizable loss.

Thus, once Seabrook went on-line, the New Hampshire legislature was presented with a policy question. Seabrook was the most costly piece of real property in the state and the largest nuclear power plant in New England. The plant posed unique burdens and risks for New Hampshire. As a matter of fairness and fiscal responsibility, Seabrook had to bear its share of the cost of state government and the special benefits of state services required by a major nuclear power plant.

The tax structure existing in New Hampshire in 1991 was inadequate to address the circumstances presented by Seabrook. PSNH and the New Hampshire Co-op were paying a total of about $6.5 million in electric utility franchise taxes, but most of the remaining owners, including EUA Power, paid nothing because they were not subject to the tax.[2] Stipulation ¶ 10.1-10.2. On the other hand, PSNH and the New Hampshire Co-op paid no business profits taxes. Stipulation ¶ 17.1. The business profits taxes paid by the out-of-state owners of Seabrook aggregated only about $1.9 million. Stipulation ¶ 17.1. With the costs of New Hampshire government exceeding $673 million, Stipulation Exhibit 6 at 26, Seabrook and its owners simply were not paying their fair share.

New Hampshire had traditionally relied on statewide property taxes to a larger extent than many other states, in part, because the state imposes no general sales or personal income taxes. Stipulation ¶¶ 11.2, 11.3, 12.3, 12.4. In the telecommuni-

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[2] Prior to 1991, all utilities selling electricity in the state were subject to a franchise tax in the amount of one percent on the gross receipts from sales of electricity within New Hampshire. RSA 83-C:2. Sales of electricity generated in New Hampshire, but sold outside the state, were exempt from the tax.

cations industry, the Telephone Tax — a statewide property tax — raised nearly $10 million in 1989. Stipulation ¶ 11.3.[3] Statewide property taxes are also used in the railroad industry.[4] Stipulation ¶ 12.4.

The beginning of service at Seabrook presented an obvious occasion for consideration of a statewide property tax of the type that had been used by the state in the telephone and railroad industries. A property tax on Seabrook could be measured by the very event that called for the tax — the new presence in New Hampshire of an exceedingly valuable, distinctive piece of real property. Moreover, the tax could be paid in proportion to the owners' interests in that property, an unassailably fair apportionment of the burden of the tax.

Thus, as the Seabrook plant began its first full year of operation in January, 1991, Stipulation ¶ 3.19, the New Hampshire legislature promptly addressed the new situation presented by the plant's opening and enacted the Nuclear Property Tax, imposing an *ad valorem* property tax at the rate of 0.64% on every dollar of assessed valuation of nuclear property within New Hampshire. RSA 83-D:3; Stipulation ¶ 2.1.[5] The tax applies to each owner of nuclear property "in the proportion that such person's ownership interest bears to the entirety of the ownership in the property." RSA 83-D:5; Stipulation ¶ 3.1. There is no differentiation in rate or application as to taxpayers

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[3] In 1990, the legislature restructured state taxation of the telecommunications industry with the repeal of the telephone tax and the adoption of the Communications Services Tax, which became effective on March 31, 1990.

[4] The Supreme Court of New Hampshire noted in 1970 that "[r]ailroads and telephone companies are presently subject to a state property tax upon their estates at the state level, according to the current average property rate." *Opinion of the Justices*, 110 N.H. 117, 123, 262 A.2d 290, 295 (1970).

[5] The New Hampshire Revised Statutes Annotated are referred to as "RSA ____."

engaged in interstate versus intrastate commerce. The tax applies only to electric utilities owning interests in Seabrook. It does not apply to Plaintiffs — Connecticut, Massachusetts or Rhode Island — or to their citizens. In addition, just as the Telephone Tax had been repealed when the state's tax structure was reviewed and revised with the introduction of the Communication Services Tax, the introduction of an even-handed Nuclear Property Tax presented the occasion to reconsider the tax structure applicable to electric utility owners of Seabrook. The conclusion was the enactment of the Nuclear Property Tax, accompanied by a repeal of the franchise tax as applied to electric utilities.[6] Stipulation ¶ 2.3.

The result of these revisions avoided inequitable division of the tax burden associated with the existence of Seabrook. All joint owners would pay the tax at the same rate. For the intrastate utilities owning an interest in Seabrook — PSNH, the New Hampshire Co-op and EUA Power — the repeal of the franchise tax and the enactment of the Nuclear Property Tax resulted in an increase in tax liability of more than $4 million, from about $6.5 million per year to more than $11 million. Stipulation ¶ 10.2. For interstate utilities owning the remainder of Seabrook, it meant that, henceforth, they would pay their share of Seabrook's statewide property tax burden — approximately $11 million. Moreover, the tax would be paid regardless of whether the co-owners were realizing profits or whether Seabrook was actually generating electricity.

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[6] As Senator Thomas Colantuono, Vice Chairman of the Senate Ways and Means Committee, explained:

> We went to a property tax, because we have had prior experiences with property taxes from the telephone tax, which was a property tax on telephone company equipment. Some of you may remember that last year we replaced that tax with a broader communications tax. But for many years, we had a property tax on telephone equipment. This is similar.

Hearing Transcript, May 2, 1991 at 2.

The remaining issue considered by the legislature was the role, if any, that should be played by the Business Profits Tax in the new system for taxation of Seabrook's owners. The Business Profits Tax had been providing no revenue for the state from the New Hampshire electric utilities owning interests in Seabrook. Stipulation ¶ 17.1. The revenue produced by the Business Profits Tax, as applied to electric utilities, came entirely from out-of-state corporations doing business in the state, most of which were members of holding company groups having business interests in more than one state. Stipulation ¶¶ 17.1, 1.5-1.7, 5.6, 5.11, 5.15, 5.24.

Given the unimportance of the Business Profits Tax as applied to electric utilities in the past, the uncertainty of the tax as a source of revenue due to the record of losses incurred by Seabrook's New Hampshire owners and the decision to rely on an *ad valorem* property tax on Seabrook's owners, the legislature essentially abandoned the Business Profits Tax for all Seabrook owners. The mechanism chosen to accomplish this result was already present in the Business Profit Tax statute — a list of credits against the business profits tax enumerated in RSA 77-A:5. The legislature used this existing mechanism and added the new Nuclear Property Tax to the list of credits.

After this change, the only remaining role for the Business Profits Tax for Seabrook's owners was, as a practical matter, insignificant. The tax would come into play only if an owner of Seabrook had business profits that were so large that they would produce a Business Profits Tax obligation in excess of the owner's Nuclear Property Tax payment. For the New Hampshire utilities owning an interest in Seabrook, business losses rather than profits were the rule. The new Business Profits Tax was essentially an "excess profits" tax and, for corporations incurring losses, an excess profits tax was meaningless. Moreover, although the interstate utilities and holding companies owning interests in Seabrook had earned substantial profits in the preceding five years, Stipulation ¶ 18.1, the significant Nu-

clear Property Tax credit made the new excess profits tax, essentially, a meaningless matter for them as well.

In short, given that the Business Profits Tax applied only to the extent that an owner's profits were extremely high, New Hampshire's new system for taxing the owners of Seabrook was a system of *ad valorem* property taxation. Each owner of Seabrook would pay a property tax at the same rate based on its ownership interest in Seabrook, and nothing more. If business profits taxes are ever paid, they are most likely to be paid by the owners doing the most business in New Hampshire, not the least. New Hampshire has no control over the decisions of other states to impose income taxes and because the Plaintiff States each tax income properly apportioned to them, Seabrook owners may pay income taxes to those states. But that result is not attributable to anything New Hampshire has done. With respect to the matter within its control — the taxation of income within New Hampshire — the state has adopted a system that would impose income taxes only on the most profitable companies doing substantial amounts of business within New Hampshire. This approach is not discriminatory under the Commerce Clause or under 15 U.S.C. § 391.

ARGUMENT

A. The Nuclear Property Tax Is An *Ad Valorem* Tax On Real Property And Cannot Constitute A Burden On Interstate Commerce (Background To Specific Arguments in Support of Exceptions)

It has long been recognized that "States have considerable latitude in imposing general revenue taxes." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 622 (1981). For this reason, this Court's decisions assessing the constitutionality of state tax structures are guided by the principle that:

> We have always "declined to undertake the essentially legislative task of establishing a 'single constitutionally mandated method of taxation.'"

Trinova Corp. v. Michigan Dep't of Treasury, 111 S.Ct. 818, 836 (1991) (citation omitted). The New Hampshire legislature was entitled to recognize the commencement of operations at Seabrook as a significant event calling for a new approach to the state's tax provisions affecting electric utilities. In doing so, it enacted a nondiscriminatory *ad valorem* Nuclear Property Tax that clearly satisfies all constitutional requirements.

Plaintiffs,[7] the Intervening Utilities and the *amici curiae* contend that electricity generated at the Seabrook Plant is often sold in interstate commerce and that a property tax on the plant constitutes an unconstitutional burden on interstate commerce. But this Court's decisions have made it clear that a state tax which affects interstate commerce is perfectly permissible "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). The best example of such a tax is an *ad valorem* real property tax.[8] The Special Master agreed, concluding that New Hampshire's property tax by itself does not violate the Commerce Clause. Final Report at 26 n.17. This conclusion is supported by a long line of decisions of this Court.

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[7] Plaintiffs refers to both the Plaintiff States and the intervening utilities unless the context indicates otherwise.

[8] Commentators have summarized the point in these words: "[a]rguably, the clearest example of state taxation that should not be subject to commerce clause review is *ad valorem* real property taxation." Philip M. Tatarowicz & Rebecca F. Mims-Velarde, *Symposium on State and Local Taxation: An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 Vand. L. Rev. 879, 892 (1986).

1. Real Property Taxes Have Long Withstood Challenge Under The Commerce Clause

The right of states to impose *ad valorem* real property taxes without offending the Commerce Clause has long been established and has survived the periodic reformulations of the tests used in Commerce Clause cases. In *Adams Express Co. v. Ohio State Auditor*, 165 U.S. 194, 220 (1897), the Court stated:

> [W]hatever the particular form of the exaction, if it is essentially only property taxation, it will not be considered as falling within the inhibition of the Constitution.

Similar observations appear in the decisions throughout this century.[9]

The unquestionable validity of *ad valorem* real property taxes results in the absence of any modern authorities considering Commerce Clause challenges to such taxation and investigation reveals no case in which an *ad valorem* real property tax has ever been invalidated under the Commerce Clause. This Court in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609,

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[9] *E.g.*, *Wells, Fargo & Co. v. Nevada*, 248 U.S. 165, 167 (1918) ("[W]hat was taxed was the company's property in Humboldt County . . . . [C]onsistently with the commerce clause of the Federal Constitution, the State could not tax the privilege or act of engaging in interstate commerce, but could tax the company's property within the State, although chiefly employed in such commerce."); *St. Louis & E. St. L. Elec. Ry. v. Missouri*, 256 U.S. 314, 318 (1921) ("[W]hile a State may not, in the guise of taxation, constitutionally compel a corporation to pay for the privilege of engaging in interstate commerce, . . . this immunity does not prevent the State from imposing an ordinary property tax upon property having situs within its territory and employed in interstate commerce."); *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254-55 (1938) ("It was not the purpose of the Commerce Clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business. 'Even interstate business must pay its way,' and the bare fact that one is carrying on interstate commerce does not relieve him from many forms of

624 (1981), underscored the special nature of real property taxes when it upheld Montana's severance tax on coal against a Commerce Clause challenge, stating:

> In many respects, a severance tax is like a real property tax, which has never been doubted as a legitimate means of raising revenue by the situs State . . . .

To the extent that Commerce Clause decisions deal with "property" taxes at all, they have focused on movable personal property in the stream of interstate commerce. Such cases present questions about the nexus of the property with the state, the method of apportionment of the tax and the resulting risk of multiple taxation that cannot occur when dealing with real property taxation. Other cases involve taxes that are labelled "property" taxes, but are in fact measured by gross receipts, such as the tax considered by the Court in *Aloha Airlines, Inc. v. Director of Taxation*, 464 U.S. 7, 13-14 (1983).

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state taxation which add to the cost of his business. He is subject to a property tax on the instruments employed in the commerce.") (citations omitted); *Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362, 368 (1940) ("That the states may classify property for taxation; may set up different modes of assessment, valuation and collection; may tax some kinds of property at higher rates than others; and in making all these differentiations may treat railroads and other utilities with that separateness which their distinctive characteristics and functions in society make appropriate — these are among the commonplaces of taxation and of constitutional law."); *Norfolk & W. Ry. v. Missouri State Tax Comm'n*, 390 U.S. 317, 323 (1968) ("It is of course settled that a State may impose a property tax upon its fair share of an interstate transportation enterprise. That fair share may be regarded as the value, appropriately ascertained, of tangible assets permanently or habitually employed in the taxing State, including a portion of the intangible, or 'going concern,' value of the enterprise. . . . [T]he States have been permitted considerable latitude in devising formulas to measure the value of tangible property located within their borders.") (citations omitted).

It is indisputable that the Nuclear Property Tax is an *ad valorem* tax on real property in New Hampshire. Stipulation ¶ 2.1. The claim that such a tax discriminates against interstate commerce bears no relation to any challenge to state taxation that this Court has ever seriously considered. As the Court stated last year in *Trinova Corp. v. Michigan Dep't of Treasury*, 111 S.Ct. 818, 836 (1991) (citations omitted):

> In reviewing State taxation schemes under the Commerce Clause, we attempt "to ensure that each State taxes only its fair share of an interstate transaction." We act as a defense against state taxes which, whether by design or inadvertence, either give rise to serious concerns of double taxation, or attempt to capture tax revenues that, under the theory of the tax, belong of right to other jurisdictions.

Ad valorem real property taxation presents none of the concerns that underlie the Court's Commerce Clause decisions. If any "safe harbor" of state taxation remains, surely New Hampshire's Nuclear Property Tax falls within it.

2. The Fact That Interstate Utilities Own Interests in Seabrook Is Irrelevant

Any argument that nonresidents owning property in New Hampshire and engaging in interstate commerce cannot be required to pay their proportionate share of an *ad valorem* property tax clearly fails to state a claim, whether their ownership interest exceeds 50%, 75%, or even if it reaches 100%. Any such claim is foreclosed by established law, settled for more than 100 years. The Special Master agreed, concluding that "[t]he fact that about 60% of the Seabrook Station is owned by utility companies selling electricity directly or indirectly to out-of-state consumers" does not invalidate the tax. Final Report at 26 n.17.

His conclusion is correct for several reasons. First, as a general matter, no such claim could be made because it is beyond question that "interstate commerce must bear its fair share of the state tax burden," *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 620 n.9 (1981), and "may constitutionally be made to pay its way." *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981). "It was not the purpose of the Commerce Clause to relieve those engaged in interstate commerce from their just share of state tax burden . . . ." *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938). This Court has long rejected the notion that a "state tax must be considered discriminatory for purposes of the Commerce Clause if the tax burden is borne primarily by out-of-state consumers." *Commonwealth Edison*, 453 U.S. at 618. It is the settled rule that so long as a tax "is computed at the same rate regardless of the final destination of the [power], and there is no suggestion . . . that the tax is administered in a manner that departs from this evenhanded formula," there is no constitutional infirmity. *Commonwealth Edison*, 453 U.S. at 618.

Second, the specific question whether the out-of-state residence of a property owner confers immunity from state property taxes has been considered and rejected. *E.g.*, *Bacon v. Illinois*, 227 U.S. 504, 512 (1913) ("[In *Coe v. Errol*], the claim of immunity [from taxation] by reason of the fact that [the property] was owned by non-residents was at once disposed of."); *Southern Ry. v. Greene*, 216 U.S. 400, 415 (1910) ("It does not lie in a foreign corporation to complain that it is subjected to the same law with the domestic corporation."); *Coe v. Errol*, 116 U.S. 517, 524 (1886) ("We have no difficulty in disposing of the last condition of the question, namely, the fact . . . that the property was owned by persons residing in another State; for, if

not exempt from taxation for other reasons, it cannot be exempt by reason of being owned by non-residents of the State").[19]

In *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), this Court upheld Montana's severance tax on coal as applied to utilities selling to out-of-state customers, even though 90% of the coal mined in Montana was exported to other states. The resulting taxes, paid by nonresidents of Montana, accounted for almost 20% of Montana's tax revenue. In response to the utilities' claim that the tax must be considered discriminatory because its enormous burden was being borne primarily by out-of-state consumers, this Court concluded:

> [T]here is no real discrimination in this case; the tax burden is borne according to the amount of coal consumed and not according to any distinction between in-state and out-of-state consumers.

Id. at 618.

The same observation can be made here. The burden of the tax is borne in proportion to ownership interests in New Hampshire property, not in accordance with the residence of the owners. Moreover, unlike in *Commonwealth Edison*, at the time the Nuclear Property Tax was enacted, interstate utilities owned only slightly more than 50% of Seabrook and, given that ownership structure, New Hampshire utilities (including PSNH, The New Hampshire Co-op and EUA Power) would

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[19] The significance of out-of-state ownership is even more questionable in this case. For example, if, instead of being held by the utilities as tenants in common, Seabrook were owned by a single corporation, with a consortium of utilities holding stock interests, the corporation itself would be liable for the nuclear property tax and the net expense would be allocated to the utility shareholders on a per-share basis. If the corporation owning Seabrook were organized under New Hampshire law, for ownership purposes, Seabrook would be considered 100% owned by a New Hampshire resident.

have paid roughly one half of the tax. The remaining $11.5 million of Nuclear Property Tax that would have been paid by out-of-state utilities would account for about 1.7% of New Hampshire's General Fund Cash Expenditures which exceeded $673 million in the fiscal year ended June 30, 1991. Stipulation Exhibit 6 at 26. The out-of-state owners of the largest nuclear power plant in New England clearly are not paying more than their fair share of the costs of New Hampshire state government when their contribution is so modest.

3. Settled Law Bars Plaintiffs' Fallback Claim That Seabrook Was Impermissibly Classified

The Intervening Utilities advanced a fallback argument that New Hampshire does not have the right to classify nuclear property for purposes of imposing a property tax or that it may not tax Seabrook Station because it is owned by out-of-state interests. For the reasons previously described in subsection 2, it is clear that the out-of-state ownership of Seabrook is irrelevant to an assessment of the validity of New Hampshire's property tax. The classification of the property subject to the tax need only satisfy the liberal standards traditionally applied to state tax classifications under the Equal Protection Clause. The Special Master agreed, rejecting the Intervenors' classification argument under the Commerce Clause and under 15 U.S.C. § 391. Final Report at 19 n.11 and 26-27 n.17. In doing so, he stated:

Under the ownership component of Plaintiffs' argument, the constitutionality of the tax would turn on the use of corporate or joint ownership, not on whether the tax and credits or exemptions apply evenhandedly to each taxpayer. Similarly, if the ownership interests in Seabrook continue to be traded, Stipulation ¶¶ 3.7, 3.9 and 3.18, it is possible that a New Hampshire utility serving retail customers in the State could eventually own 100% of Seabrook. Presumably, under the ownership component of Plaintiffs' argument, the Nuclear Property Tax would only become nondiscriminatory at that moment.

> It would be hard to say that New Hampshire did not have a reasonable basis for establishing different tax schemes for a nuclear plant, indeed the largest nuclear plant in New England, and fossil fuel and hydro plants.

Final Report at 27 n.17.

The Special Master's conclusion was clearly correct. In *Nordlinger v. Hahn*, 112 S.Ct. 2326 (1992), the Court reaffirmed the broad discretion of states to establish classifications for taxing purposes and upheld California's property tax classification permitting longer-term owners of property to pay lower taxes than newer owners of comparable property. Noting that the standard of review is "especially deferential," the Court quoted the general rule endorsed in prior case law:

> In structuring internal taxation schemes the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.

112 S.Ct. at 2332 (citations and quotation marks omitted). The Courts will uphold a state's decision to impose a tax if there is "a plausible policy reason for the classification." *Id.*

New Hampshire's decision to tax nuclear station property, rather than conventional generating plants, clearly falls within its power to classify under the standards applied by this Court. The New Hampshire legislature made specific findings in support of its decision. It found that:

I. Nuclear station property is the only property in the state that generates electricity from the fission of atoms.

II. Creating electricity from the fission of atoms imposes unique responsibilities on the state.

III. A nuclear station creates special and unique public safety requirements and burdens on the state.

IV. A nuclear station has a unique and long lasting impact on the environment which creates burdens on the state.

RSA 83-D:1. These findings are legislative judgments that support the decision to impose a tax on nuclear station property. There is no basis under the Constitution or any federal statute to disregard these findings or to substitute Plaintiffs' judgment for that of the New Hampshire legislature. The record in this case establishes that there are unique burdens associated with nuclear reactors, including the dangers inherent in the production of nuclear energy, and in dealing with its waste. Stipulation ¶¶ 13.1, 13.3-13.9, Attachment A.[11] After the accidents at Three Mile Island and Chernobyl, there can be no serious question that the mere existence of a nuclear power plant places a unique burden on the host state. The Special Master properly rejected Intervenors' argument that New Hampshire lacks the power to classify Nuclear Station Property for taxation.

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[11] The sharp differences between a nuclear and fossil fuel electric power plant in terms of their impact on the State and its citizens clearly warrant a separate classification of the nuclear power plant. The regulations issued by the Federal Nuclear Regulatory Commission reflect the extraordinary costs, risks and burdens to which the State and local governments are subjected by a nuclear power plant located in the State. See the N.R.C. regulations dealing with the licensing of nuclear power plants (10 C.F.R. Part 51 (1992)), the handling of nuclear materials (10 C.F.R. Part 70 (1992)), the packaging and transportation of nuclear materials (10 C.F.R. Part 71 (1992)), the storage of spent nuclear fuel and high-level radioactive waste (10 C.F.R. Part 72 (1992)) and the physical protection of plants and materials (10 C.F.R. Part 73 1992)). The great magnitude of the costs and other burdens that may be imposed on State and local governments by nuclear power plants is indicated by the decision of the Atomic Safety and Licensing Appeal Board in *Matter of Long Island Lighting Co.* (Shoreham Nuclear Power Station, Dec. 12, 1986, Nuclear Regulatory Commission Decisions (CCH) ¶ 31,003.01) dealing with population evacuation in the event of an accident at the Shoreham plant.

B. The Nuclear Property Tax Does Not Violate The Commerce Clause (Recommendation C)

The Plaintiff States conceded that the Nuclear Station Property Tax statute satisfies three of the components of the four-part test of *Complete Auto*. Final Report at 13. Their entire argument was based on the contention that New Hampshire's tax discriminates against interstate commerce. They contended that the statute discriminates on its face and, in the alternative, that it has discriminated in actual effect. The Special Master accepted the Plaintiffs' arguments without critical analysis and concluded that the tax discriminates both on its face and in effect. In reaching this conclusion, the Final Report fails to apply the appropriate standards for assessing the constitutionality of a state statute and disregards the only evidence in the record about the actual effect of the statute, relying instead on hypothetical examples that are inconsistent with the facts in this case.

1. The Nuclear Property Tax Does Not Discriminate On Its Face

The Special Master correctly concluded that New Hampshire's property tax, by itself, is valid. The entire basis for the

Final Report's recommendation that the Court find in favor of the Plaintiff States is that the credit against New Hampshire's business profits tax discriminates against interstate commerce. The Report concludes that the credit discriminates on its face, but never discusses or applies the standard for determining facial invalidity. Had the correct standard been applied, the Special Master would have had to conclude that the statute is constitutional on its face.

Any party challenging the constitutionality of a tax has the burden of proof, *Norton Co. v. Dep't of Revenue*, 340 U.S. 534, 537-38 (1951); *Department of Revenue of Washington v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 750 (1978), but one who contends that a tax is unconstitutional on its face has a special burden. As the Court stated in *United States v. Salerno*, 481 U.S. 739, 745 (1987):

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid .... We think respondents have failed to shoulder their heavy burden to demonstrate that the Act is "facially" unconstitutional.

Instead of applying this test, the Special Master turned the test on its head, in effect adopting an entirely new standard under which a state tax system is invalid if any circumstance can be imagined in which discrimination would result. This new test is clearly contrary to *Salerno*.

Under the appropriate *Salerno* test, the Nuclear Property Tax is valid on its face. The Nuclear Property Tax is imposed on all owners of nuclear station property in proportion to their ownership (RSA, Sec. 83-D:5) and there is no distinction made in the statute between owners selling electricity in interstate commerce and those selling in intrastate commerce. There is no

differentiation in the allowance of the credit against the business profits tax or in the amount of the credit depending on whether the taxpayer is an interstate or an intrastate utility, or whether the electricity generated at a nuclear power station is sold within or without the state. There is no basis for concluding from the face of the statute that discrimination will ever result from its operation. There is certainly no basis for concluding, as the test of facial invalidity requires, that discrimination will always result in every circumstance.

The New Hampshire's system is in sharp contrast to the taxing statutes which this Court has held to be facially discriminatory. For example, in *Maryland v. Louisiana*, 451 U.S. 725 (1981), the statute exempted from the Louisiana First Use Tax outer continental shelf ("OCS") gas consumed in Louisiana, but not OCS gas consumed outside the state. In *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984), the New York tax allowed a credit for DISC export sales only if they were "shipped from a regular place of business of the taxpayer within [New York]". In *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318 (1977), the statute provided for preferential tax treatment of nonresidents if they made their sales in New York. In *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963), the statute exempted from the measure of the state's sales tax labor or service costs incurred in manufacturing machinery in the state, but included such costs in the use tax if the manufacturing took place outside the state.

In all those cases the language of the statutes explicitly provided for preferential tax treatment of intrastate commerce as compared to interstate commerce. Because the language of the statutes required preferential treatment, no set of circumstances existed in which the acts could be valid. *See United States v. Salerno*, 481 U.S. 739, 745 (1987). In contrast, no discrimination between intrastate and interstate commerce is to be found on the face of the New Hampshire Nuclear Property Tax statute or the business profits tax statute. Where a statute

is not facially discriminatory, as in this case, taxpayers have the burden of demonstrating by facts or factors outside the statute, that discrimination against interstate commerce exists.

Not only does the language of New Hampshire's statute eliminate any basis for contending that facial discrimination is present, but the facts in the record establish that the New Hampshire system is valid under the *Salerno* test. Although Plaintiffs contended that, in effect, New Hampshire utilities avoid the burden of the Nuclear Property Tax while out-of-state owners of Seabrook do not, the record demonstrated, and the Special Master found, that all owners paid the tax. Collectively, they paid $11.2 million for the last half of 1991 in direct proportion to their ownership interests in Seabrook. Final Report at 7. For 1992, they paid approximately $24 million. Final Report at 8.

Plaintiffs also contended that the New Hampshire tax system discriminates on its face by treating owners differently for business profits tax purposes. The record demonstrates, and the Special Master found, that this contention was also incorrect. The Final Report concludes that "for both 1992 and 1993, no Seabrook joint owner will pay the Business Profits Tax." Final Report at 11, 29 n.18. Plaintiffs offered no evidence concerning any other future years and the Special Master indicated that experience and the Intervenors' projections demonstrate that, "as a practical matter," the Seabrook owners will never pay any business profits taxes. Final Report at 29 n 18.

The facts in the record and the Special Master's findings establish all that is necessary to defeat a claim that the Nuclear Property Tax discriminates on its face. The only "set of circumstances" that measures the actual effect the tax has had demonstrates that no discrimination results. All of the owners paid the Nuclear Property Tax. No owner avoided payment of it.

Even if the extent to which owners claimed credits against their business profits tax liability were relevant, the evidence demonstrated no favoritism toward owners engaged in intrastate sales of electricity. The few owners engaging solely in intrastate sales of electricity did not claim a Nuclear Property Tax credit because they had no business profits tax liability. Four of the owners engaged in interstate sales of electricity — Canal, UI, CL&P and New England Power — claimed Nuclear Property Tax credits offsetting $1,470,620 of business profits taxes that would otherwise have been owed to New Hampshire for 1991. These circumstances prove that New Hampshire's tax system does not discriminate on its face.

The Special Master's Final Report does not and could not question any of these facts, each of which is established by the record. The Report makes no finding that any New Hampshire owners of Seabrook or any New Hampshire consumer received favored treatment under the statute. It makes no finding that they will ever receive favored treatment in the future because they will not.

In short, Plaintiffs and the Intervening Utilities failed to establish that the Nuclear Property Tax discriminates on its face. The language of the statute contains no preferential provisions of the type that have resulted in determinations of facial invalidity in other cases. The *Salerno* test of facial validity is therefore satisfied because all of the facts in the record demonstrate that the tax operates fairly and does not discriminate in favor of utilities engaging in intrastate sales of electricity or in favor of New Hampshire citizens.

2. The Nuclear Property Tax Results In No Multiple Taxation And Is Internally Consistent

Because the Nuclear Property Tax satisfies the test of facial validity set forth in *United States v. Salerno*, 481 U.S. 739, 745

(1987), Plaintiffs did not attempt to meet their burden of establishing that the tax is invalid on its face under that standard. Instead, they suggested use of an alternative standard — the internal consistency test, relying on this Court's decision in *Armco, Inc. v. Hardesty*, 467 U.S. 638, 644 (1984), which applied the test in the context of alleged discrimination. The Special Master accepted the Plaintiffs' suggestion and applied the internal consistency test, but did so without any discussion of the numerous opinions of this Court indicating that the test should not be applied in a case of this type. The Special Master's reliance on the internal consistency test is thus misplaced because the test is not relevant to any issue presented here.

The role of the internal consistency test in Commerce Clause cases has been the subject of considerable controversy. The only application of the test which is not controversial is the application for which it was originally designed — to identify whether state taxes are properly apportioned. The test was announced in *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983), in which the Court considered the constitutionality of a California corporate franchise tax that assigned income of multi-state corporations to California using a three-factor formula. Beginning from the proposition that the formula used to apportion income must "be fair," the Court stated:

> The first, and again obvious, component of fairness in an apportionment formula is what might be called internal consistency — that is, the formula must be such that, if applied by every jurisdiction, it would result in no more than all of the unitary business' income being taxed.

Id. at 169.

Since *Container Corp.* was decided, the internal consistency test has generally been referred to as an apportionment test.

American Trucking Ass'ns v. Scheiner, 483 U.S. 266, 284 (1987) (unapportioned flat tax on interstate and intrastate trucks violates internal consistency test); *Goldberg v. Sweet*, 488 U.S. 252, 261 (1989) ("[W]e determine whether a tax is fairly apportioned by examining whether it is internally and externally consistent.");[12] *Trinova Corp. v. Michigan Dep't of Treasury*, 111 S.Ct. 818, 832 (1991) ("Trinova does not contest the internal consistency of the SBT's apportionment formula, and we need not consider that question.").

In two cases, decided in 1984 and 1987, *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), and *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232 (1987), the internal consistency test was used for a different purpose. In those cases, which will be discussed in more detail in this section, the business and occupation taxes contained exemptions making them facially discriminatory under the test of *United States v. Salerno*, 481 U.S. 739, 745 (1987). But in both cases, the state raised as a defense the argument that the discriminatory taxes were "compensating taxes" — in the sense that "use" taxes on interstate sales compensated for the absence of sales taxes on such transactions. *See Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937). After reasoning that the two taxes were not compensating taxes, the Court applied the internal consistency test to determine, without referring to actual facts, whether the challenged tax resulted in a discriminatory multiple tax burden. By assuming that every other state imposed the same tax system as the defendant state, the Court concluded that the multiple tax burden existed, thereby confirming its conclusion that the challenged taxes could not be defended as compensating taxes.

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[12] In *Goldberg v. Sweet*, the Court sustained an Illinois tax on the full charge for interstate telecommunication that originated or terminated in the State, if the communication was charged to an Illinois service address. The Court found that the Illinois tax satisfied the internal consistency test.

Apart from its mainstream use as a test of apportionment formulas and its isolated use to evaluate compensating tax defenses in *Armco* and *Tyler Pipe*, the internal consistency test has played no role in Commerce Clause cases. And yet, the mere possibility that it might be used in any other context has engendered substantial controversy. For example, a dissenting opinion in *Scheiner*, rejected the idea that *Armco* establishes "a grandiose version of the 'internal consistency test' as the constitutional measure of all state taxes under the Commerce Clause." 483 U.S. at 266. In *Tyler Pipe*, a dissent commented that, prior to *Armco*, "the internal consistency test was applied only in cases involving apportionment," *Id.* at 256, and expressed the view that the "internal consistency principle is nowhere to be found in the Constitution." *Id.* at 254. In *Trinova*, the majority wrote that, beyond facial discrimination, the "deeper meaning" of the Commerce Clause mentioned in *Scheiner* refers only to "the requirement of fair apportionment, as expressed in the tests of internal and external consistency," once again confining the internal consistency test to the fair apportionment question.

Given the limited role of the internal consistency test and the controversy concerning its application to any question other than apportionment, the Final Report's assumption, without analysis, that the test applies in this case is unpersuasive. Once again, the Special Master recommends that the Court break new ground, severely limiting the power of the states to rely on different taxing principles. A careful review of this Court's deci-

sions and the circumstances in which the internal consistency test has been applied clearly suggest that the test has no application here.[13]

i. The Internal Consistency Test Is Primarily Concerned With Multiple Taxation Of The Kind That Results From Unapportioned Taxes

The primary function of the internal consistency test is to identify situations in which states impose unapportioned taxes, presenting the risk that a taxpayer's income, sales, receipts or other subjects of taxation will be taxed twice. It is this risk of multiple taxation that results in special scrutiny of taxes that appear to pose such a danger.[14] As the cases demonstrate, however, the concern of the Court has not been with the number of different taxes a taxpayer may become obligated to pay to different states. Instead, the Court has rejected efforts to impose two or more taxes on the same income, sales, receipts or other subjects of taxation.

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[13] None of the cases in which this Court has dealt with the internal consistency test involved a tax credit against any other tax and there is nothing in the language of any of those cases that suggests that the internal consistency test applies to offsetting credits for other taxes. The test has never been applied to invalidate an *ad valorem* property tax.

[14] The multiple taxation doctrine was enunciated by Justice Stone in *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938). The Court was concerned about the "multiplication of state taxes" that results from a state tax that imposes on interstate "commerce burdens of such a nature as to be capable in point of substance, of being imposed . . . with equal right by every state which the commerce touches, *merely* because interstate commerce is being done, so that without the protection of the Commerce Clause, it would bear cumulative burdens not imposed on local commerce." 303 U.S. at 255-56.

The Court in *Container Corp.* made this focus clear by stating that application of the internal consistency test results in "no more than all of the unitary business' income being taxed." 463 U.S. at 169. In *Goldberg v. Sweet*, 488 U.S. 252, 260-61 (1989), the Court explained that the purpose of the apportionment requirement is "to ensure that each State taxes only its fair share of an interstate transaction," and, therefore, "[t]o be internally consistent, a tax must be structured so that if every state were to impose an identical tax, no multiple taxation would result." (citations omitted).

It was concern over multiple taxation that led the Court in *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 284-87 (1987), to invalidate Pennsylvania's flat tax on truckers. A tax on truckers that had been measured by the number of miles driven in the state would have presented no problem because, even if every state imposed such a tax, no multiple taxation would result. Each state would collect a tax in proportion to the number of miles driven in the state. No state would be taxing miles driven in another state. But, because Pennsylvania's tax was not apportioned, enactment of the same flat tax system in every other state would have resulted in the taxation by each state of far more than its share of annual trucking mileage in the state. Interstate truckers under such an unapportioned flat tax system would clearly have incurred a multiple tax burden whereas intrastate truckers would not. *See United States v. Sperry Corp.*, 493 U.S. 52, 61 n.7 (1989) (discussing *Scheiner* and stating that the Pennsylvania tax imposed a "much higher charge per mile traveled" on out-of-state vehicles).

Although Plaintiffs relied on *Scheiner* and the Final Report cites it as if it had some relevance (Final Report at 38), the tax at issue in that case bears no similarity to the tax challenged here. The concern that the Court expressed in *Scheiner* — the risk of multiple taxation arising from an unapportioned tax — is not presented in this case. An analysis of both aspects of the system — the Nuclear Property Tax and the excess business

profits tax — confirms the conclusion that New Hampshire's system for taxing owners of Seabrook presents no risk of multiple taxation.

By itself, the Nuclear Property Tax clearly presents no risk of multiple taxation. This is because, unlike the flat tax in *Scheiner*, the Nuclear Property Tax is an *ad valorem* property tax, apportioned precisely in accordance with ownership interests in property located in New Hampshire. Only New Hampshire could enact such a tax on Nuclear Station Property located in that state and New Hampshire taxes only each owner's proportionate interest in the property. Thus, each owner pays its fair share of the tax and there is no risk of multiple *ad valorem* taxation of the nuclear property.

Similarly, New Hampshire's system of taxation of the business profits of Seabrook owners results in no multiple taxation. The Seabrook station is in New Hampshire. Stipulation ¶ 3.1. It is operated by employees who work in New Hampshire. Stipulation ¶ 7.46. No part of the Seabrook station property is located in any state other than New Hampshire. Consequently, the profits of the out-of-state owners of Seabrook from these operations would not be taxable in their home states.

No multiple taxation of any Seabrook owner's profits will ever occur. Due Process and Commerce Clause principles prohibit other states from taxing income attributable to New Hampshire:

> The principle that a State may not tax value earned outside its borders rests on the fundamental requirement of both the Due Process and Commerce Clauses that there be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-345 (1954). The reason the Commerce Clause includes this limit is self-evident: in a

> Union of 50 States, to permit each State to tax activities outside its borders would have drastic consequences for the national economy, as businesses could be subjected to severe multiple taxation. But the Due Process Clause also underlies our decisions in this area. Although our modern due process jurisprudence rejects a rigid, formalistic definition of minimum connection, see *Quill Corp. v. North Dakota*, 504 U.S. __, __-__ (1992), we have not abandoned the requirement that, in the case of a tax on an activity, there must be a connection to the activity itself, rather than a connection only to the actor the State seeks to tax. See *id.*, at __, (quoting *Miller Bros., supra*, 347 U.S., at 344-345).

Allied-Signal Inc. v. Director, Div. of Taxation, 112 S.Ct. 2251, 2258 (1992).

The corporate business profits and income taxes of New Hampshire and the tax systems of all of the Plaintiff States recognize these constitutional limitations on their taxing powers. Their statutes provide for the apportionment of business profits or net income of corporations that conduct business within and without the state. All four states use the three-factor property, payroll and sales formula that is in force in most of the states that tax corporate profits or income. (*See* ¶ 233, RIA All States Tax Guide). Consequently, the out-of-state utility owners of Seabrook are not subjected to a risk of multiple taxation of income or profits from the Seabrook plant.

Not only is there no risk of multiple taxation, but, to the contrary, what New Hampshire has done is essentially to abandon the business profits tax for owners of Nuclear Station Property, foregoing the opportunity to impose such a tax on profits attributable to New Hampshire except to the extent that exceptionally large profits are earned. New Hampshire's decision not to tax a portion of the business profits that it is clearly entitled

to tax results in no multiple taxation. Instead, it results in certain profits remaining untaxed by any state.[15]

Because New Hampshire's system presents no risk of multiple taxation, the Final Report's evaluation of the system under the internal consistency test, which searches for multiple taxation, is clearly misplaced. As the Court stated in *Goldberg v. Sweet*, 488 U.S. 252, 261 (1989):

> To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result.

As discussed in the next section, if every state imposed the Nuclear Property Tax system New Hampshire adopted, no multiple taxation or discrimination of any kind would result.

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[15] The effect of New Hampshire's decision not to impose ordinary business profits taxes on owners of Nuclear Station Property can be illustrated by considering UI's 1991 earnings and state income taxes. UI earned $12,901,110 in 1991. Stipulation ¶ 7.15. Nearly half of UI's property was located in New Hampshire. Under its three factor apportionment formula, New Hampshire was entitled to tax slightly more than 13%, or $1,726,517 of UI's profits. Stipulation ¶¶ 7.14-7.15. Nonetheless, New Hampshire elected to assess no business profits tax on UI and thus did not tax that $1,726,517 of profits. Under Connecticut law, that $1,726,517 of UI's profits escape taxation because Connecticut apportions its taxpayers' income within and without the state and:

> For purposes of apportionment of income under this section, a taxpayer is taxable in another state . . . if such state has jurisdiction to subject such taxpayer to such a tax, regardless of whether such state does, in fact, impose such a tax.

Conn. Gen. Stat., Corporation Business Tax 12-218 (1989). Thus, UI's income is not subjected to multiple taxation. Instead, the New Hampshire portion of that income remains untaxed.

ii. Even If The Internal Consistency Test Applied, New Hampshire's Tax System Satisfies The Test

Even if the internal consistency test applied in this case, a correct application of the test shows that New Hampshire's system would satisfy it. The test hypothesizes the existence of New Hampshire's system in other states and analyzes the effects the system would have if it existed everywhere. Thus, application of the test in this case would involve assuming that all states imposed *ad valorem* property taxes on Nuclear Station Property and allowed payments of their nuclear property tax to be credited against their business profits taxes.

No multiple taxation results from hypothesizing the existence of New Hampshire's nuclear property tax system in every state. Every state would impose only one nuclear property tax on nuclear property located in the state.[16] No plant would be subjected to multiple taxation because each state could impose an *ad valorem* tax only on the property within its borders. And because nuclear property tax payments would be credited against business profits taxes in every state, no state would impose business profits taxes on the income of nuclear property owners unless that income was so large that it would have resulted in a tax obligation in excess of the amount of nuclear property tax paid.

The Special Master's effort to apply the internal consistency test results in a different conclusion — that some nuclear property owners "are subject to two taxes, the Seabrook Tax plus a business profits tax owed to other states." Final Report at 37. He reaches this conclusion, however, by making an incorrect

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[16] In fact, Vermont does impose a tax on nuclear property, which has not been challenged by the owners of Vermont Yankee, some of whom are Intervenors in this case. Vt. Stat. Ann. tit. 32 8601, 8661; Stipulation ¶ 6.24.

assumption that forces the result. This incorrect assumption is that, under the internal consistency test the effects of the nuclear property tax system in other states should be considered for taxpayers "owning no other nuclear property," apart from their interest in Seabrook. Final Report at 37. In other words, the Special Master hypothesizes that other states would impose nuclear property tax systems but would have no nuclear property within their borders — a most peculiar assumption. The effect of this hypothesis, of course, is that the assumed tax system makes no sense in any of the other states because the whole point of the system — to rely primarily on taxation of nuclear property, rather than on taxation of income from that property — is defeated.

If the internal consistency test is to be applied in this case, it must be applied in a sensible way. Because it is a nuclear property tax system, any hypothetical application of the system must assume the existence of nuclear property.[17] When the test is applied with this logical assumption, the result is that the system functions just as New Hampshire intended it to function. It causes all states to rely on a property tax as the principal source of revenue from owners of nuclear property and it eliminates business profits taxes in every state for all but the most profitable owners, who, at most, might become subject to the excess profits feature of New Hampshire's system.

Thus, unlike the unapportioned flat tax in *Scheiner*, New Hampshire's tax system would satisfy the internal consistency test. No multiple taxation or discrimination results from hy-

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[17] In fact, any assumption that the owners of Seabrook own no other nuclear property would be inconsistent with the actual facts. For example, the Connecticut Yankee and Millstone 1-3 nuclear power plants are located in Connecticut; the Pilgrim plant is located in Massachusetts and the Vermont Yankee plant is located in Vermont. Stipulation ¶ 6.20. Seabrook owners have interests in these plants. In fact, CL&P has ownership interests in all four nuclear plants located in Connecticut. Stipulation ¶¶ 6.21, 6.22 and 6.25.

pothesizing the existence of New Hampshire's Nuclear Property Tax system in other states. The Final Report's conclusion that the system fails the internal consistency test is incorrect.

iii. Even The *Armco/Tyler Pipe* Version Of The Internal Consistency Test Fails To Support Plaintiffs' Position

As described at the beginning of this section, the most controversial application of the internal consistency test occurred in *Armco* and *Tyler Pipe*. The Final Report suggests that New Hampshire's tax system involves the same problem identified by the Court in *Armco* and that "without question" the system fails the internal consistency test. Final Report at 37. But the New Hampshire system bears no relation to the taxes invalidated in *Armco* or *Tyler Pipe* and the reasons the Court applied the internal consistency test in those cases do not exist here.

The tax system in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), was entirely different from the system Plaintiffs challenge in this case. In *Armco*, West Virginia imposed a gross receipts tax on persons engaged in the business of selling tangible property at wholesale. 467 U.S. at 640. However, West Virginia's wholesaling tax contained an exemption making the tax inapplicable to persons engaged in manufacturing in West Virginia. *Id.* Thus, by its terms, the tax applied to out-of-state manufacturers making wholesale sales in West Virginia, but not to in-state manufacturers making wholesale sales. This exemption made the wholesaling tax discriminatory on its face. Unlike in *Armco*, there is no exemption in New Hampshire's Nuclear Property Tax for New Hampshire utilities. All owners of Seabrook are subject to the tax and all of them pay it.

West Virginia's wholesaling tax discriminated on its face because, by its terms, it applied to out-of-state manufacturers,

but not to in-state manufacturers. There was no need to resort to the internal consistency test to identify the discrimination. The Court resorted to the internal consistency test only because West Virginia attempted to defend its facially discriminatory exemption by arguing that it compensated for the state's manufacturing tax on in-state manufacturers. West Virginia contended that in-state and out-of-state manufacturers each paid one or the other tax, but not both. It was in response to this argument that the internal consistency test was invoked.

Armco argued that it could be required to pay both taxes, because it might have to pay a manufacturing tax in its own state, while it would still be liable for the wholesaling tax in West Virginia. West Virginia responded that Armco should have to show that it would actually pay such a manufacturing tax. It was on this question that the Court disagreed and turned to the internal consistency test, hypothesizing the existence of West Virginia's tax system in every other state to determine if one or both taxes would be paid by a taxpayer in Armco's position. The Court concluded that if all states used the same system, Armco would pay a manufacturing tax in its own state, Ohio, and a wholesaling tax in West Virginia.[18] The manufacturing tax could not be a compensating tax because the internal consistency test demonstrated that Armco might have to pay it *and* the wholesaling tax.

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[18] Unlike the Special Master, in applying the internal consistency test in this case, the *Armco* Court did not have to assume — contrary to fact and logic — that Armco engaged in no wholesaling activity in any state other than West Virginia in order to apply the test and reach the conclusion that West Virginia's tax system failed it.

Consistent with *Armco*, if the internal consistency test is to be utilized in this case, it is logical to assume (as is the case, see footnote 17) that Seabrook owners both earn income and own nuclear property in their home states.

Armco's internal consistency test has no application in this case. New Hampshire has not exempted in-state companies from any tax. It is not arguing that some other tax constitutes a compensating tax for that exemption. It is collecting a property tax from every owner of Seabrook in direct proportion to its ownership interest in Seabrook. It is not collecting business profits taxes from any of them. And if it ever collects excess business profits taxes, it will collect them only from the owners doing the most business and earning the most profits properly apportioned to New Hampshire. There is no discrimination or multiple taxation of the type identified in *Armco*.

The same distinctions apply to *Tyler Pipe Indus., Inc. v. Washington*, 483 U.S. 232 (1987), "implicitly applying" the internal consistency test. *Tyler Pipe* involved a Washington tax which, like the West Virginia tax in *Armco*, contained an exemption, the availability of which turned on whether sales were made in interstate commerce or intrastate commerce. The Court stated that the tax had "the same facially discriminatory consequences as the West Virginia exemption we invalidated in *Armco*." *Id.* at 240. As in *Armco*, Washington sought to justify its exemption under the compensatory tax doctrine. *Id.* at 242. And, as in *Armco*, the Court rejected the compensatory tax defense, citing the *Armco* discussion of the internal consistency test. The facts and holding of *Tyler Pipe* are just as inapposite to this case as those in *Armco*.

iv. The Special Master's Effort To Modify The Internal Consistency Test And Extend Its Application Is Unsupported By Any Case

The Final Report's remaining reason for concluding that New Hampshire's system fails the internal consistency test is equally flawed. The Special Master adopts a new version of the test under which a state's tax system is invalid if it "creates an incentive to shift business activities into the state." Final Report at 38. In other words, the Special Master would hold that any tax system that exerts "hydraulic pressure" fails the internal consistency test.[19] This new statement of the test is unsupported by any case and is not the measure of the validity of state tax systems.

It is well established that States may adopt tax systems that provide incentives to shift business activities into their state. The clearest example is that a state may choose not to impose an income tax. The result of such a decision is that companies doing all of their business within the state avoid any taxation of their income while companies doing some or all of their business in other states that impose income taxes do not. Such differing tax systems may provide incentives to shift business activities from one state to another, but they do not violate the internal consistency test. There is no Constitutional require-

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[19] When the "practical operation," *Maryland v. Louisiana*, 451 U.S. 725, 756 (1981), of New Hampshire's decision not to tax ordinary business profits is considered, the "hydraulic pressure" argument in this case becomes completely unrealistic. A plant location decision of a utility, for example, depends on a myriad of factors, including the comparative views of the utility regulatory commissions in the States involved as to rate increases, differing siting requirements, the comparative existing wage rates and union conditions in the States, economic conditions, personal income taxation, comparative housing costs, availability of water, roads, sewers, the general cultural ambience of the State and its resulting attractiveness to employees, and the like. For a remote utility, the availability and expense of transmission services would be an additional major consideration. The suggestion that a Connecticut utility serving Connecticut customers would decide to locate its plants in New Hampshire because New Hampshire does not tax ordinary business profits is not practical or consistent with the reality of actual operations. 451 U.S. at 756. Moreover, the suggestion that a Connecticut utility would locate personnel in New Hampshire to influence the calculation of state taxes is equally unrealistic. Finally, any implication that utilities can shift sales among states to suit tax planning ignores reality and restriction of franchise territories in this regulated industry.

ment that all states impose income taxes or that all states impose income taxes at the same rate.[39]

The Final Report's conclusion — that the Commerce Clause is violated if one Seabrook owner has a "heavier total tax burden" than another, Final Report at 38, because one owner pays two taxes (for example, a Nuclear Property Tax to New Hampshire and an income tax to, say, Connecticut) whereas another owner pays only one tax (a Nuclear Property Tax to New Hampshire) — is flawed and is not supported by the internal consistency cases. If a state does not impose income taxes but does impose property taxes, the result is that in-state owners of property pay one tax — a property tax — and out-of-state owners pay two taxes — a property tax and an income tax in their own state. There is nothing unconstitutional or internally inconsistent about such a system. It is the natural result of one state's decision to forego collection of taxes on income, which is precisely what New Hampshire has done in the statute challenged in this case. Indeed, under the theory advanced by the Plaintiffs, the constitutionality of this property tax is controlled by whether the State also has an income tax rather than by the actual effect on commerce of the *ad valorem* tax.

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[39] To support the finding that the New Hampshire tax system encourages the shifting of business into the State, the Special Master identifies the June 5, 1992 merger of PSNH and NU as doing "exactly what the Seabrook tax and credit scheme creates a strong incentive to do. . . ." Final Report at 32. In reaching that conclusion, the Special Master suggests that the merger was motivated by New Hampshire's tax system. The record demonstrates that the merger had nothing to do with the new tax system. The bankruptcy of PSNH occurred on January 28, 1988 and the confirmation by the Bankruptcy Court of a plan of reorganization took place on April 20, 1990. The confirmed plan required PSNH to merge with NU. Stipulation ¶ 3.6. The agreement for the merger of the companies was thus in place over a year before the Nuclear Property Tax was enacted. There is no basis for the Report to find any causal connection between the existence of the tax system and the merger.

Thus, a review of the few cases in which the Court has used the internal consistency test demonstrates that it provides no support for Plaintiffs' position in this case. Even the most controversial applications of the test, in *Armco* and *Tyler Pipe*, are of no assistance to Plaintiffs and do not support the conclusion reached by the Special Master. Instead, Plaintiffs' internal consistency argument is an effort to establish a new principle of constitutional law that the foregoing examples demonstrate cannot withstand analysis. In adopting the Plaintiffs' argument, the Special Master would have the Court create new law in order to invalidate the New Hampshire tax system. The New Hampshire system satisfies the internal consistency test and is valid on its face.

3. The Nuclear Property Tax Does Not Discriminate In Effect

The Final Report purports to apply settled principles from this Court's Commerce Clause decisions in concluding that the Nuclear Property Tax discriminates in actual effect. The Report states that New Hampshire's credit against the Business Profits Tax is "[l]ike the Louisiana first-use tax" at issue in *Maryland v. Louisiana*, 451 U.S. 725 (1981), and "plainly falls within the ambit" of the prohibition against certain impermissible credits described in *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984). Final Report at 27-28. But the New Hampshire statute is unlike the laws addressed in those cases and citation of those decisions is no substitute for finding actual discrimination in this case.

The Final Report's conclusion that the Nuclear Property Tax discriminates in actual effect is contrary to the evidence. The facts set forth in part 1 of this section reveal that the Nuclear Property Tax has resulted in no discrimination against interstate commerce since it was enacted. Moreover, the historical

facts suggest that in the future the same conclusion will be reached — the New Hampshire system does not discriminate.

Because plaintiffs were unable to show discrimination based on actual facts, they contended that the effects of the tax should be measured by speculation about the future. Plaintiffs couched this speculation in the form of projections prepared by certain of the owners of Seabrook, but the effort to predict the future is necessarily uncertain and speculative. The utilities themselves acknowledged that their projections are based on assumptions about things that cannot be predicted with any certainty: "weather, economic conditions, fuel costs, competition from alternative sources of supply and other facts." Stipulation ¶8.1, 9.1, 14.1. When a tax has operated without discrimination, "proof" in the form of speculation about future events is an insufficient basis on which to declare a state tax unconstitutional.

The Special Master's Final Report highlights the absence of any proof of discrimination by relying, at every critical juncture, not on proof from the record, but on hypothetical examples. Final Report at 22-24, 29. To the extent that the Report refers to the record, it often contains references to the speculative projections, rather than to actual facts. Final Report at 29-33. And, whether the Report examines projections or actual facts, it adopts as its standard of comparison the "percentage of Seabrook Tax Credit utilized" — a measure which does not identify discrimination and is not a test of the constitutionality of New Hampshire's tax system.

The facts in the record demonstrate, and the Final Report acknowledges in part, that many factors which have nothing to do with the arguments in this case cause the "percentage of Seabrook tax credit utilized" to vary from owner to owner. The "percentage share of Seabrook owned" compared to the size of each owner's business and "the profitability in any given year of a Seabrook owner (or its unitary group)" primarily determine

the percentage of the credit that each owner is able to use. Final Report at 21. The conclusion that differences in the percentage of the credit useable by different owners demonstrates discrimination is clearly incorrect. Many credits provided by tax statutes go unused for many reasons. If every taxpayer had to be able to use the same percentage of every credit established by every tax statute in order to avoid a finding of discrimination, nearly every statute providing a credit would be discriminatory.

Thus, a comparison of percentages of credit utilized is not the measure of discrimination and the Special Master's effort to base a finding of discrimination on this test was error. The impropriety of the Special Master's test is particularly apparent in this case because, regardless of the percentage of credit that each owner will use in the years covered by Plaintiffs' projections, each owner has sufficient credits to eliminate entirely any obligation to pay New Hampshire business profits taxes.

i. The Final Report's Conclusion That Discrimination Exists In This Case Is Not Supported By The Cases Cited

Plaintiffs' challenge to New Hampshire's Nuclear Property Tax system relies extensively on the decision in *Maryland v. Louisiana*, 451 U.S. 725 (1981), and the Final Report reflects a similar reliance. A comparison of the Nuclear Property Tax system and the first use tax system in *Maryland* highlights the absence of the requisite showing of discrimination in this case.

In *Maryland v. Louisiana*, Louisiana imposed a "first use" tax on natural gas that was produced offshore on federal land and adopted tax credits and exemptions that were only available to local businesses. The Court stated that:

> A state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the

> State's tax scheme .... In this case, the Louisiana First-Use Tax unquestionably discriminates against interstate commerce in favor of local interests as the necessary result of various tax credits and exclusions.

Id. at 756. As discussed in Section B (1), the evidence in this case establishes that discrimination is not "the necessary result" of the New Hampshire tax system. In fact, when the system is assessed in light of its actual effect, it is clear that no discrimination results.

In contrast, the discrimination in *Maryland v. Louisiana* was clear on the face of the statute.[21] For example, the Louisiana first use tax contained an exemption, making the tax completely inapplicable to the use of gas for drilling oil or gas within Louisiana. *Id.* at 733. No similar exemption was available for gas used to drill for oil or gas in other states. Unlike the Louisiana first use tax, the Nuclear Property Tax contains no exemptions, and certainly no exemptions available only to in-state interests.

Similarly, some taxpayers subject to the first use tax could claim a credit against other Louisiana taxes, but the credit was only available if the taxpayer was engaged in the business of extracting natural resources within Louisiana, *Id.* at 732, or was a municipal or Louisiana-regulated electric generating plant or natural gas distributing service located within Louisiana, *Id.* at 733. Thus, the interstate pipeline companies, which paid the majority of the first use tax, were completely unable to claim a credit. *Id.* at 758.

[21] The same was true of *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318 (1977), in which the statute provided for preferential tax treatment of nonresidents if they made their sales in New York, and *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963), in which the statute exempted from the measure of the State's sales tax labor or service costs incurred in manufacturing machinery in the State, but included such costs in the use tax if the manufacturing took place outside the State. Like the Louisiana first use tax, those taxes were discriminatory on their face.

Unlike these credits, the Nuclear Property Tax credit is available to all taxpayers. All of the out-of-state utilities owning interests in Seabrook have substantial property in New Hampshire and, under the state's three-factor apportionment formula, have significant income subject to the New Hampshire business profits tax.[22] In fact, some of these utilities, including the United Illuminating Company, New Haven, Connecticut; Montaup Electric Company, West Bridgewater, Massachusetts and Canal Electric Company, Cambridge, Massachusetts, have approximately 40 to 50% of their property in New Hampshire. Stipulation ¶¶ 7.7, 7.15, 7.21.

Because the Nuclear Property Tax credit is available to all owners of Seabrook, New Hampshire's system is entirely different from tax statutes that make exemptions or credits available only to in-state businesses, as in *Maryland v. Louisiana* or *Arizona Pub. Serv. Co. v. Snead*, 441 U.S. 141 (1979), or that allow out-of-state businesses a smaller credit because they do business in other states, as in *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 397 (1984). The Nuclear Property Tax

[22] Plaintiffs suggest that, unless electricity generated at Seabrook is "sold within the State" by an owner, there is no "business activity for purposes of the Business Profits Tax." Plaintiffs' Brief Before the Special Master at 48-49. They argue that owners making sales "outside New Hampshire" are not subject to the business profits tax and do not have a "tax basis against which to take a credit." *Id.* These contentions are incorrect because the ownership of property in New Hampshire by each of the owners constitutes business activity in the State for purposes of the business profits tax and, if the owners' sales of electricity within or outside New Hampshire generate profits, a portion of those profits will be allocated to and taxable by New Hampshire under its three-factor apportionment formula. Thus, contrary to Plaintiffs' assertion, all owners of Seabrook will have a "tax basis against which to take a credit." *Id.*

credit is made available to all owners of Seabrook on the same basis — their percentage ownership interest in nuclear station property. It does not matter whether the owners are engaged in interstate or intrastate commerce. Nor does it matter whether they do any other business in New Hampshire apart from owning an interest in Seabrook. This completely distinguishes the Nuclear Property Tax credit from the credit in *Westinghouse*, where the amount of credit a corporation could claim was "determined by reference to shipments of export property from a regular place of business in New York." Under New York's system in *Westinghouse*, in-state New York companies shipping $10,000,000 of products would receive a greater credit than out-of-state corporations shipping the same $10,000,000 of products, merely because the out-of-state corporation's shipping operations occurred partly from its own state and only partly from New York.

If the amount of the credit is determined in a way that does not discriminate against out-of-state businesses, nothing in *Westinghouse* would invalidate the state's tax system just because the credit may benefit one taxpayer more than another. The *Westinghouse* Court was careful to state that the allowance of a credit against a state income tax does not offend the Commerce Clause. 466 U.S. at 406 n.12. The Final Report quotes this statement, but fails to consider its implications. Final Report at 35 n. 25. The *Westinghouse* Court's opinion contains a lengthy discussion of the apportionment process, recognizing that it results in the allocation to New York of less income of an out-of-state than of an in-state corporation. But the Court nonetheless stated that the "provision of the credit" did not offend the Commerce Clause, even though the credit would be of value only in proportion to the taxpayer's liability for the tax against which the credit is allowed. The credit violated the Commerce Clause only because it was allowed on an impermissible basis that differentiated among taxpayers according to the location

from which they shipped exports. No such impermissible differentiation in the allowance of the credit exists in this case.

The Final Report's finding of discrimination is inconsistent with the reasoning of *Westinghouse*. The Final Report finds discrimination solely because New Hampshire provided a credit against an income tax — precisely the action that *Westinghouse* states does not offend the Commerce Clause. The Report identifies no respect in which New Hampshire's credit is allowed on an impermissible basis. It relies entirely on the conclusion that the credit will be more valuable to owners conducting more of their activities in New Hampshire. Final Report at 28.[23] Basing a finding of discrimination on this conclusion is plainly inconsistent with the *Westinghouse* Court's reasoning.

The Final Report fails to recognize or address the inconsistency between the recommended decision and the *Westinghouse* reasoning. Instead, the Report attempts to respond only to an observation made by New Hampshire in its brief that a large number of tax credits that have long been widely used by the states would be vulnerable if an income tax credit were held to be discriminatory merely because income tax liability

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[23] Indeed, the only discussion of the facts in the record is an illustration that the value of the Nuclear Property Tax credit against the business profits tax increases as an owner's liability for the New Hampshire business profits tax increases. Thus, when NU had $122,160 of New Hampshire business profits tax liability in 1991, the credit had a maximum value of $122,160 to it. If NU has a larger business profits tax liability in 1993 (which is impossible to predict), the value of its credit will be larger. Final Report at 29-33. The Court in *Westinghouse* understood this simplistic relationship between the value of a credit and the taxpayer's income tax liability, but did not hold that the provision of a credit against an income tax violates the Commerce Clause. Instead, it said just the opposite.

varies with the extent of business activity in a state.[24] Quoting the very language from *Westinghouse* that demonstrates the error in the Final Report's reasoning, the Report asserts that *Westinghouse* rejected the "parade of horribles" argument. Final Report at 35 n. 25. In fact, *Westinghouse* does not reject the argument at all. It establishes the principle on which New Hampshire relies — that provision of a credit against an income tax does not offend the Commerce Clause, even though such a credit is of value to taxpayers (assuming equal levels of profitability) in proportion to the amount of activity they conduct in a state.

[24] Among the state tax provisions that would be arguably unconstitutional would be the credit allowed by some states for the costs of research. A corporate income tax credit of 8% to 12% allowed by California for the cost of research is illustrative. Cal. Rev. & Tax Code 23609 (1991); P-H State & Local Tax Serv. ¶ 12,010.115. Assume that a manufacturing company based in Oregon owns a small plant in California, where it conducts only an insubstantial portion of its business. The company engages in research that costs it more than its California net income. If Plaintiffs' position were upheld, the Oregon company could challenge the constitutionality of the California credit provision on the ground that it is likely to obtain less proportionate credit for research than California based corporations that do most of their business in that state.

California also grants a credit of 10% of the cost of a solar energy system that is installed in premises in the state used for commercial purposes. The credit is allowed against the California corporate franchise and income tax. Cal. Rev. and Tax Code 23601.5 (1990); P-H Cal. State & Local Taxes ¶ 12,220.500. If Plaintiffs' premise were sound, an out-of-state based corporation that installs a solar energy system in California, where it carries on only a small fraction of its business, could contend that the credit provision violates the Commerce Clause on the ground that it would be likely to obtain only *de minimis* tax reduction from the credit, whereas, in-state corporations that carry on a large part of their business in the state are likely to obtain substantially larger tax reductions from the solar energy system credit.

Plaintiffs' position, if upheld, would also arguably invalidate the corporate income tax credits granted by many states for the employment of workers in an "enterprise zone," *see* Ill. Income Tax Act, Ill. Rev. Stat. ch. 120, par. 2-201(G) (1991); P-H State & Local Tax Serv. ¶ 2.010.115; and credits such as the Virginia credit of 10% of the cost of machinery and equipment used at fixed plants in the state for processing recycled personal property. Va. Code Ann. 58.1-445.1; P-H Va. State & Local Taxes, ¶ 12,733. The far-reaching impact that the contention being made in this case would have on a large number of existing state tax credits emphasizes the importance of the Court's adhering to its decision in *Westinghouse* and the other Commerce Clause decisions, none of which casts doubt on the validity of a credit such as the Nuclear Property Tax credit.

Finally, it is important to note that the purpose of the Nuclear Property Tax credit and the way that it functions are entirely different from the credits addressed in the cases cited in the Final Report. The credit was merely a convenient method to eliminate the business profits tax as applied to Seabrook's owners and to retain only an excess profits tax — a method that fit within the structure of New Hampshire's existing tax statutes. According to Plaintiffs' projections, the excess profits tax will not come into effect in the foreseeable future, if at all. What is left is a property tax paid by all Seabrook owners and a nondiscriminatory excess business profits tax that, if it is ever paid, will be paid by the owners who do the most business in New Hampshire, not the least.

ii. The Facts Do Not Support A Finding of Discrimination

The evidence in the record demonstrates that there has been no discrimination in effect. New Hampshire is collecting a property tax and nothing more. Collection of a property tax at the same rate from all owners of nuclear property is not discriminatory.

Plaintiffs' entire argument and the Final Report's recommendation are based on the assumption that a state's decision not to impose an income tax is discriminatory if imposition of the tax would have generated more revenue from some taxpayers than

from others. There is no authority under the Commerce Clause to declare a tax system invalid when the taxes actually imposed do not discriminate.

But even applying Plaintiffs' theory — adopted by the Special Master — that the Commerce Clause evaluates the effect of not imposing a tax, rather than the effect of the tax imposed, the same conclusion would be reached. Plaintiffs have not demonstrated discrimination under their theory. Because the out-of-state utilities owning Seabrook do business in New Hampshire, they have historically — and will have, as projected by Plaintiffs — substantial business profits tax liability and they will be the principal beneficiaries of New Hampshire's decision not to impose a tax on business profits. In fact, the substantial profits of these out-of-state utilities, as compared to the losses of the New Hampshire owners, means that the failure to tax business profits since the Nuclear Property Tax was enacted has been more meaningful for interstate than for in-state utilities. Stipulation ¶¶ 17.1, 18.1.

For example, the United Illuminating Company earned $55,550,000 in 1991; the much smaller Canal Electric Company earned $18,978,000; CL&P earned $240,818,000 and New England Power Company earned $134,747,000. Stipulation ¶ 18.1. The substantial earnings history and capacity of these utilities, together with their presence in New Hampshire (subjecting a significant portion of their incomes to the business profits tax) makes them the major beneficiaries of the Nuclear Property Tax credit. Since the Nuclear Property Tax was enacted, these out-of-state utilities are the only Seabrook owners who have filed business profits tax returns claiming a Nuclear Property Tax credit. To date, they have been the sole beneficiaries of the credit. And yet each of these companies has intervened in this action, contending that the credit discriminates against them because they are engaged in interstate commerce and even their speculative projections do not establish discrimination in favor of in-state utilities.

The absence of any proof of discrimination in actual effect is highlighted by a comparison between the assertions Plaintiffs made when they sought leave to file this case and the evidence that was introduced through the Stipulation of the Parties. Plaintiffs' assertion at the time this case was filed and thereafter was that "it is clear" that only one utility, PSNH, will benefit from the decision not to tax business profits. Plaintiffs' Brief in Support of Motion For Leave To File Complaint at 9 n.4. This assertion has been shown to be false. PSNH has had nothing but losses for the last five years. It lost more than $100 million in 1990 alone. Stipulation ¶ 17.1. Given the company's record of losses, the suggestion that it is earning business profits and incurring business profits tax liability is clearly wrong. PSNH paid no business profits taxes in 1991 or in any of the five years before 1991. Stipulation ¶¶ 7.46, 17.1. Because it has had no business profits tax liability, PSNH would not have benefitted from a decision not to tax business profits if it had been made in the past. Nor did it benefit after the statute was enacted. Stipulation ¶ 7.46.

The two other New Hampshire corporations owning interests in Seabrook likewise have had no business profits tax liability. EUA Power Corporation, like PSNH, has had a record of losses for years. Stipulation ¶ 17.1. It has been forced to sell its share of electricity generated at Seabrook at prices that do not cover its costs, let alone provide any opportunity for a profit and it is unsure "when, if ever" it will be able to obtain a long-term purchased power contract that might improve it financial position. Stipulation ¶¶ 14.2- 14.3. The New Hampshire Co-op — PSNH's largest customer and itself a 2.2% owner of Seabrook — is not subject to the Business Profits Tax and could not be a beneficiary of the credit. Moreover, the New Hampshire Co-op lost nearly $5 million in 1990 and, without any income, would not have a business profits tax liability, even if it were subject to the tax. Stipulation ¶ 17.1.

Thus, when the facts are examined, it becomes clear that the decision not to tax the business profits of any of Seabrook's owners has been of more benefit to the utilities engaging in interstate commerce than to the intrastate owners. Because the interstate utilities have benefitted from the credit they are challenging, their customers also benefitted. Thus, as the Final Report acknowledges, consumers of electricity in the Plaintiff States have not been the victims of preferential treatment accorded to utilities serving New Hampshire consumers. The Final Report concedes that "customers in New Hampshire have borne as much of the burden of the Seabrook Tax as those in Plaintiff States." Final Report at 16. Faced with this undisputed evidence, it is difficult to understand how the Special Master could have concluded that New Hampshire's Nuclear Property Tax system discriminated in actual effect. The conclusion is unsupported by any evidence and was incorrect.

C. 15 U.S.C. § 391 Does Not Apply To The Nuclear Property Tax (Recommendation B)

1. The Nuclear Property Tax Is Not A Tax On Or With Respect To The Generation Or Transmission Of Electricity

Plaintiffs alleged and the Special Master concluded that the Nuclear Property Tax discriminates against out-of-state manufacturers, producers, wholesalers, retailers, or consumers of electricity in violation of 15 U.S.. § 391. The Final Report correctly notes that New Hampshire has raised the threshold question whether Plaintiffs Section 391 complaint states a claim because Section 391 applies only to a "tax on or with respect to the generation or transmission of electricity,"[25] and the Nuclear Property Tax is not such a tax. The Special Master acknowledged the split in authority concerning the reach of Section 391 (Final Report at 18 n 10), but adopted the broadest possible interpretation of the statute, concluding that it extended so far as to include ordinary property taxes. The Special Master's construction of Section 391 was overbroad and inconsistent with the language and purpose of the statute.

The scope of Section 391 is obvious from a review of its language, its legislative history and the few cases interpreting and applying it. The Final Report's conclusion that an *ad valorem* tax on nuclear station property is a tax "on or with respect to the generation or transmission of electricity" is simply incorrect.

The best indications of the scope of the statute are the clear statements about the reason for its enactment. The statute was enacted specifically to invalidate a New Mexico law. *Arizona Pub. Serv. Co. v. Snead*, 441 U.S. 141, 143, 147-48 (1979). The New Mexico tax was not simply a tax on someone engaged in the business of generating or transmitting electricity. It was a tax measured by the volume of electricity *generated* in New Mexico — at the rate of $.0004 per kilowatt hour.

This Court's discussion of Section 391 in *Arizona Pub. Serv. Co. v. Snead* underscores the narrow focus of the law — a particular state statute which imposed a tax measured by the generation of electricity. Indeed, the Court quoted the legislative history which referred to one unnamed state, noted that the tax was "concededly a tax on the generation of electricity," 441

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[25] Section 391 provides:
No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity.

U.S. at 149, and quoted the Senate floor debate, in which "Senator Cranston of California made it clear that the provision was aimed directly at New Mexico's electrical energy tax." *Id.* at 147. The legislative history of 15 U.S.C. 391 thus left no question that the New Mexico statute imposed a tax falling within 15 U.S.C. 391. A subsequent decision considering Section 391 observed that, in *Arizona Pub. Serv. Co. v. Snead*, "the Supreme Court had before it a legislative enactment directed at a state statute that Congress had declared to be discriminatory." *Duquesne Light Co. v. State Tax Dep't*, 327 S.E.2d 683, 685 (W. Va. 1984), *cert. denied*, 471 U.S. 1029 (1985).

On the other hand, Section 391 was not intended to apply to property taxes, such as the Nuclear Property Tax. The Nuclear Property Tax is not a tax on the "generation or transmission of electricity." It is a tax on nuclear property, assessed as a percentage of the valuation of the property. The differences between a tax on the generation of electricity and a property tax are apparent. While receipts from a tax on generation or transmission vary with the output of a generation facility or the use of a transmission line, receipts from a property tax are fixed by the property's value. Property tax liability continues to accrue even when a nuclear reactor is out of service, for example, for refueling. Stipulation ¶¶ 3.20-3.21. A tax on generation or transmission of electricity would produce no revenue when operations were suspended.

Plaintiffs argued that, even if the Nuclear Property Tax is not a tax "on" the generation or transmission of electricity, it is a tax "on or with respect to" generation or transmission, citing cases dealing with the meaning of the phrases "relate to" and "relating to." Plaintiffs' Brief at 44. The Final Report cites the Random House Dictionary for the proposition that the phrase "with respect to" encompasses any tax having a "relation or reference" to generation or transmission. Final Report at 18. But neither Plaintiffs nor the Special Master cited any cases supporting this expansive view of the phrase "with respect to"

and the few cases dealing with the phrase indicate that it is much narrower than Plaintiffs contend or the Final Report suggests. For example, in *Henshel v. Guilden*, 300 F. Supp. 470, 472 (S.D.N.Y. 1969), the court interpreted the phrase "with respect to" in 28 U.S.C. § 2201 (1958) narrowly. It concluded that, even though a federal tax assessment was a material element of a declaratory judgment case, the case was not one seeking a judgment "with respect to Federal taxes," and an exception in Section 2201 was therefore not applicable. A similar issue and result are presented by *King v. United States*, 390 F.2d 894, 914 (Ct. Cl. 1968), *rev'd on other grounds*, 395 U.S. 1 (1969).

Moreover, there are no cases holding that Section 391 applies to a property tax just because the property is an electrical generating plant. Only two cases discuss the scope of the statute's application. In the most closely analogous case considering the meaning of a tax "on or with respect to the generation or transmission of electricity," *Pacific Power & Light Co. v. Montana Dep't of Revenue*, 237 Mont. 77, 773 P.2d 1176 (1989), the Montana Supreme Court concluded that Section 391 did not apply to a beneficial use tax on the owners of electrical generating plants for their use of electrical transmission lines having 500 kilovolt or greater ratings. The Court stated:

> [T]his tax falls neither upon the generation nor the transmission of electrical power, but upon the use of tax exempt facilities. As such, this tax does not violate 15 U.S.C. § 391.

773 P.2d at 1185. The Final Report relies on the other decision dealing with the scope of the statute — *Nevada v. City of Burbank*, 100 Nev. 598, 691 P.2d 845, 847 (1984), in which the court applied Section 391 to a tax on "the value of any right to receive electric power." But even if the Nevada decision correctly interprets Section 391, a tax on the value of the right to receive electricity is clearly more similar to a tax on the generation or transmission of electricity than is an ordinary property tax.

The Nuclear Property Tax, like the beneficial use tax in *Pacific Power & Light*, is not a tax upon generation or transmission of electrical power.[38]

Not only does the language of the Nuclear Property Tax provide that it is a tax on property rather than on the generation or transmission of electrical power, but the facts in the record establish that the operation of the tax since it was enacted has been completely different than and inconsistent with the operation of a tax on or with respect to the generation or transmission of electricity. The Seabrook plant began operating in 1990. Between June 1, 1990 and December 31, 1991 alone, it experienced 18 short-term unscheduled outages or outage extensions and 7 reductions of power. Stipulation ¶ 3.19. Yet despite the outages and power reductions, the Nuclear Property Tax was assessed and paid throughout this period. Stipulation ¶ 3.21. On July 25, 1991, the plant ceased operation entirely for refueling and maintenance and was not returned to service until October 16, 1991. Stipulation ¶ 3.20. Thus, the plant was idle, generating no electricity for more than two months. Nonetheless, the Nuclear Property Tax was assessed and paid without change. Stipulation ¶ 3.21. As recently as September 7, 1992, the plant again ceased operating, but the Nuclear Property Tax continues to accrue at the same rate. Stipulation ¶¶ 3.20-3.21.

Plaintiffs' contention that the Nuclear Property Tax is "in effect" a tax on generation or transmission "notwithstanding that the tax takes the form of a tax on property" is without substance. The plain terms of the statute, *Mallard v. United States District Court*, 490 U.S. 296, 300 (1989)("Interpretation of a statute must begin with the statute's language"), *United States*

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[38] Indeed, unlike the tax in *Pacific Power & Light*, the Nuclear Property Tax by its terms does not apply to transmission lines, which were expressly excluded from the definition of Nuclear Station Property subject to the tax. Stipulation ¶ 3.1.

v. Ron Pair Enters., Inc., 489 U.S. 235, 240-41 (1989) (when "the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms'"), and the facts concerning its operation establish that it is not governed by 15 U.S.C. § 391. As the Court stated in *Arizona Pub. Serv. Co. v. Snead*, "[t]o look narrowly to the type of tax the federal statute names . . . is to be faithful not only to the language of that statute but also to the expressed intent of Congress in enacting it." 441 U.S. at 149-50. Section 391 simply does not apply to the Nuclear Property Tax.

2. The Nuclear Property Tax Does Not Discriminate Under § 391

Even if Section 391 were applicable, the Special Master's finding that "customers in New Hampshire have borne as much of the burden of the Seabrook Tax as those in the Plaintiff States" (Final Report at 16) establishes that New Hampshire's tax does not violate the statute. Section 391 only prohibits a tax on the generation or transmission of electricity if it "results . . . in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce." 15 U.S.C. § 391. The evidence established and the Special Master agreed that there is no greater tax burden on electricity transmitted to utilities and customers in the Plaintiff States than on electricity transmitted to intrastate utilities and their New Hampshire customers. That critical fact, which is not in dispute, makes the Final Report's conclusion that Section 391 has been violated clear error. If consumers of electricity in the Plaintiff States are not paying more than consumers in New Hampshire, the New Hampshire statute does not impose a "greater burden" on electricity sold to them.

In contrast to the New Hampshire statute, the New Mexico statute which was the subject of *Snead* clearly imposed a

greater burden on electricity generated and transmitted in interstate commerce than on electricity generated and transmitted in intrastate commerce. Senator Fannin, who introduced Section 391 specifically to overturn the New Mexico statute, noted that:

> New Mexico's electrical energy tax is imposed entirely on out-of-State consumers of electricity generated in New Mexico.

Hearing on S. 1957 Before The Subcomm. on Energy of the Senate Comm. on Finance, 94th Cong., 2d Sess. (March 8, 1976), at 5. Senator Goldwater made similar observations about the discriminatory effect of the statute:

> The end result of the legislation is to tax all electricity generated in New Mexico which moves in interstate commerce and is consumed outside New Mexico and then, Mr. President, to exempt from the generating tax all of the electricity generated and consumed in New Mexico.

122 Cong. Rec. 24328 (July 28, 1976).[17]

The Special Master overlooked this critical difference between the effects of New Hampshire's tax system and the kinds of taxes to which Section 391 was addressed and concluded that the New Hampshire tax system "replicates the flaw" identified by the *Snead* Court in the New Mexico statute. Final Report at 20. But the fact that the New Mexico and the New Hampshire taxes both involved credits is no substitute for analysis of the purpose and effect of the credits, which are entirely different.

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[17] Plaintiffs contended that the New Hampshire nuclear property tax system had the same effect. The Special Master found that it did not because "customers in New Hampshire have borne as much of the burden of the Seabrook Tax as those in Plaintiff States." Final Report at 16.

In contrast to the Nuclear Property Tax credit, New Mexico's tax on the generation of electricity provided a credit that was only available to in-state interests:

> Mr. Sargent . . . . New Mexico provides that the companies that do business in the State of New Mexico selling to customers there can take a credit against the New Mexico gross receipts tax the amount paid in the New Mexico generation tax. The net effect is they don't pay the New Mexico generating tax.
>
> Senator Fannin . . . . This procedure is not available, of course, to the Arizona users or people outside the State of New Mexico?
>
> Mr. Sargent . . . . That is correct. It is not.

Hearing on S. 1957, supra, at 10.

When this Court ultimately considered the New Mexico statute in *Arizona Pub. Serv. Co. v. Snead*, 441 U.S. 141 (1979), it highlighted the unavailability of the tax credit to out-of-state interests. The Court stated that the statute allowed a tax credit only for "electricity generated inside [New Mexico] and consumed in this state." *Id.* at 143 n.4. Accordingly, the "tax-credit provisions . . . insure[d] that locally consumed electricity is subject to no tax burden . . . while [interstate electricity] . . . is subject to a 2% tax, since it is sold outside the State." *Id.* at 149 (emphasis in original).

The Final Report does not reflect any consideration of these important differences. Instead, it responds only to New Hampshire's observation about the clearly impermissible effects of the New Mexico credit. Final Report at 21. The New Mexico credit was certain to provide a dollar for dollar benefit to the favored local interests in every case because, in effect, both the 2% electrical generation tax and the 4% gross receipts tax to

which the credit applied were both measured by the same thing — gross receipts in New Mexico. The Final Report notes this difference, but dismisses it with the suggestion that it relates only to the "extent" of discrimination. Final Report at 21. When the Report had already found that, in this case, there is no greater tax burden on electricity transmitted in interstate commerce than on electricity transmitted in intrastate commerce, the unexplained suggestion that "discrimination" within the meaning of Section 391 still exists to some "extent" is clear error. The recommendation that the Court reach such a conclusion in the face of a directly contrary factual finding by the Special Master should be rejected.

D. The Final Report's Recommendation On Remedy Denies New Hampshire Basic Rights Afforded All States (Recommendation D)

Even if all of the substantive conclusions in the Final Report were correct, at most the Special Master has identified a minor defect in New Hampshire's statute. The draconian remedy the Report recommends denies New Hampshire basic rights established by the decisions of this Court. New Hampshire is entitled to those rights and the proposed remedy should be rejected.

The Report acknowledges that, when a state tax is found to violate a constitutional or statutory requirement, this Court has tended "to allow States the initial chance to correct the offending tax system." Final Report at 42. If New Hampshire's credit against the business profits tax offends the Constitution, the credit is easily eliminated (as is the nonseverability clause). The result would be collection of $1,470,620 of business profits taxes from the four out-of-state owners who claimed the credit on their 1991 business profits tax returns and, when 1992 returns are filed, collection of whatever business profits taxes are due from Seabrook owners, without allowing the credit.

Despite the ease with which any defect in New Hampshire's statute could be corrected and the Special Master's recognition that this Court's decisions provide for states to effect such corrections, the Final Report recommends that New Hampshire be denied its opportunity to remedy the defect. Instead, the Report recommends that New Hampshire be required to refund all of its property tax receipts since the statute was enacted. If this Court were to accept this conclusion, New Hampshire's $1.4 million error in favor of the out-of-state owners of Seabrook would cause it to forfeit more than $33 million of property tax revenue that the Final Report makes clear New Hampshire had the right to collect. The decisions of this Court require no such result.

1. No Refund Is Available Because Retroactive Relief Is Inappropriate

The Special Master recognized that, before the Court even considered a refund remedy, it would have to address the fundamental question whether a decision invalidating some aspect of the Nuclear Property Tax should be applied retroactively or prospectively. In *Chevron Oil Co v. Huson*, 404 U.S. 97 (1971), the Court described the circumstances under which a decision should be applied prospectively only. Although the Final Report notes that the continued viability of *Chevron's* analysis "may be in doubt," Final Report at 39, *Chevron* has not been overruled and its reasoning applied here. The first factor under *Chevron* in deciding whether a decision should be applied prospectively only is that:

> . . . the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear

> past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed.

404 U.S. at 106 (citations omitted).

New Hampshire's brief before the Special Master pointed out that no case has been cited by Plaintiffs that supports their contention that the New Hampshire Nuclear Property Tax, coupled with the credit against the business profits tax, is discriminatory against interstate commerce. It noted that any such decision would be announcing a new rule of law, inconsistent with *Commonwealth Edison Co. v. Montana*, 453 U.S. at 618 (1981), which noted that a property tax "has never been doubted as a legitimate means of raising revenue by the situs State . . . ." *Id.* at 624, and *Westinghouse*, 406 U.S. at 406 n.12, which indicated that the provision of a credit against an income tax does not violate the Commerce Clause. The Final Report concedes that a ruling against New Hampshire "apparently would for the first time" invalidate a system such as New Hampshire's. Final Report at 40. Nonetheless, the Report concludes that it "should have been apparent to New Hampshire that its Seabrook Tax and credit scheme was of dubious constitutionality." Final Report at 41. Based on this characterization of the law and the Special Master's view that New Hampshire had "no legitimate reliance expectation," the Final Report recommends that the decision be enforced retroactively with the result that New Hampshire forfeits all of the property tax revenue collected to date.

Even if the Final Report's conclusion that New Hampshire's tax system is invalid is correct, at the very least it represents a decision on an issue of first impression whose resolution was not clearly foreshadowed. Under these circumstances, the relief to be granted to Plaintiffs should be prospective only. This

conclusion is supported by Justice O'Connor's opinion in *American Trucking Ass'ns v. Smith*, 496 U.S. 167, 181 (1990), which observes that:

> [T]he threshold determination whether a new decision should apply retroactively is a crucial one, requiring a hard look at whether retroactive application would be unjust.

Retroactive application of a decision invalidating the Nuclear Property Tax would be unjust under the standards applied in *Smith* and *Chevron*. New Hampshire was entitled to rely on established precedent upholding property taxes and on the absence of any decision invalidating a nondiscriminatory income tax credit. Unlike the tax challenged in *McKesson*, the Nuclear Property Tax system is not "virtually identical" to a tax scheme invalidated by the Court in a recent decision. To the contrary, the most that Plaintiffs could contend if they prevail in this case is that they have pursued "an issue of first impression whose resolution was not clearly foreshadowed." *Chevron*, 404 U.S. at 106.[28]

Justice O'Connor's opinion in *Smith* stresses "the inequity of unsettling actions taken in reliance on" established precedents. 496 U.S. at 182. New Hampshire's past collection of property tax payments from the Seabrook owners is just such an action that it would be inequitable to disturb. As in *Smith*, "[a] refund . . . could deplete the state treasury, thus threatening the State's current operations and future plans." *Id.* The injustice of a refund here is even clearer because it would result in a windfall to Seabrook's owners who have not been injured by the

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[28] No prior decision has considered and resolved the issue in this case retroactively and there is therefore no issue of selective prospectivity of the type presented in *James B. Beam Distilling Co. v. Georgia*, 111 S.Ct. 2439 (1991).

aspects of the New Hampshire system they challenge. For all of these reasons, it is clear that, if relief is granted in this case, it should be prospective only. The Special Master's recommendation to the contrary should be rejected.

2. No Refund Is Available Under The *McKesson* Decision

If Plaintiffs prevail in this case, they are entitled to a declaration that the New Hampshire system has whatever Constitutional or statutory deficiencies the Court identifies. Admittedly, the nonseverability clause contained in the enabling legislation, H.B. 64, Chapter 364:19, prevents the Court from invalidating one aspect of the system — for example, the business profits tax credit — while upholding and enforcing the property tax. If either aspect of the system is invalidated, the New Hampshire legislature has determined that it must consider the entire system anew and, absent further legislative action, has chosen not to enforce the valid aspect of the system in the future.

But these propositions do not support the conclusion that, if Plaintiffs prevail in this case, all property tax payments received by New Hampshire in the past must be refunded. In *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), the Court considered whether a tax refund was an appropriate remedy in a case in which a Florida excise tax was successfully challenged under the Commerce Clause for providing preferential treatment for beverages made from local agricultural crops. The tax had been adopted by Florida after the Court invalidated a similar preference scheme employed by the State of Hawaii. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). Observing that, after *Bacchus*, Florida could not claim surprise that its virtually identical tax was declared invalid, 496 U.S. at 50, the Court rejected Florida's arguments that only prospective relief was appropriate. The Court

concluded that "meaningful backward-looking relief" was available as a remedy for Florida's invalid tax, but held that the remedy need only cure the discriminatory aspect of the tax. In other words, the remedy should redress the injury, but should not confer a windfall by refunding all taxes paid under the statute.

The Court described the range of options available to a state after a tax statute has been declared invalid and it has been concluded that prospective relief alone is not adequate:

> [A] State found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this determination. Florida may reformulate and enforce the Liquor Tax during the contested period in any way that treats petitioner and its competitors in a manner consistent with the dictates of the Commerce Clause . . . .

496 U.S. at 40.

Under *McKesson*, if the Court were to accept Plaintiffs' argument that the Nuclear Property Tax credit against the business profits tax makes New Hampshire's entire system invalid and that prospective relief alone is not a sufficient remedy, New Hampshire's obligations with respect to the past application of the system — during the "contested period" — would depend on the effects of the system during that period. If no actual discrimination resulted during the contested period, no action is necessary to "cure the invalidity" of the system during that period.

The record demonstrates that there has been no actual discrimination against Plaintiffs. Utilities engaged in interstate commerce have been the principal beneficiaries of the Nuclear Property Tax credit that Plaintiffs challenge. The benefit they received is the difference between the tax they paid and the tax

they would have paid in 1991 if the system had not included the credit. That difference is $1,470,620 and represents the amount of business profits tax Intervenors would have owed to New Hampshire *in addition to* the property tax payments they have already made. Stipulation ¶¶ 7.10, 7.15, 7.33, 7.40. In other words, the "cure" for whatever differential impact the credit against the business profits tax had in 1991 is not a refund by New Hampshire — it is a payment of additional taxes by certain of the Intervenors. When tax returns are filed for 1992, it is possible that an even larger payment of additional taxes would be needed to cure the advantage the interstate utilities enjoyed. Stipulation ¶¶ 8.5, 8.7, 8.13, 8.23.

The Special Master recommends that New Hampshire be denied its right to cure whatever discrimination occurred during the contested period. The first reason given for this recommendation is that there is no State Court to which this case could be remanded. Final Report at 43. But the right granted in *McKesson* is not a right to a remand; it is the right to effect a cure of a tax statute after a finding of discrimination. The right to effect a cure has nothing to do with whether a court is available on remand to supervise the State's accomplishment of a cure.[29] Here, where there is no State Court to which the case could be remanded, this Court, with the assistance of the Special Master, can and should oversee the correction of any defect in the statute.

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[29] Under the approach recommended by the Special Master, New Hampshire would be denied the rights accorded all other states, simply because the Plaintiffs chose to challenge the tax in an original action before this Court. Had the utilities proceeded through the state administrative and judicial system — an option expressly provided by RSA 83-D:10-11, and not prevailed, this matter would be before the Court on *certiorari*. Under those circumstances,the matter could be remanded to the state court to supervise New Hampshire's effort to cure whatever defect in the statute is identified by the Court.

The second reason given for denying New Hampshire the right it requested to be allowed time to effect a cure of any constitutional defect in the statute is that "New Hampshire shut its own door on the *McKesson* invitation" to effect a cure. Final Report at 43. But New Hampshire did no such thing. The only evidence the Final Report cites for this waiver by New Hampshire of a $33 million right is its statement in the non-severability clause that, if the credit is invalid, the property tax also "shall be invalid." The Special Master takes this legislative statement — phrased in the future tense — as if it were an election to refund all tax revenue collected in the past, even when *McKesson* does not require such a refund. But the non-severability clause does not address the past at all. It is merely a statement of New Hampshire's intent prospectively to reformulate the tax system if a portion of it is declared to be invalid. It certainly is not an election to waive the *McKesson* right to cure a minor defect and to forfeit $33 million of valid property tax revenue. To leave no doubt on the question, New Hampshire hereby advises the Court that it wishes to exercise its right under *McKesson* to effect a cure of any defect that may be found in its statute. This being so, the Final Report's recommendation that New Hampshire be denied its rights under *McKesson* should be rejected.

3. No Refund Is Available Because The Eleventh Amendment Bars a Refund

In addition to the matters discussed in *Chevron*, *Smith* and *McKesson*, a judgment ordering New Hampshire to pay a tax refund to Intervenors would violate the Eleventh Amendment, which provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state. . . ." While the Special Master is correct that the Eleventh Amendment has been held not to bar original actions, including actions for money judgments,

brought by states, *Maryland v. Louisiana*, 451 U.S. at 745 n.21; *Texas v. New Mexico*, 482 U.S. 124, 130 (1987), it does not authorize monetary recoveries by specific individuals on behalf of whom the state may be proceeding. 451 U.S. at 745 n.21. Thus, the Court stated in *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 258-59 n.12 (1972), "[a]n action brought by one State against another violates the Eleventh Amendment if the plaintiff State is actually suing to recover for injuries to designated individuals."[20]

The record establishes and the Special Master concedes that consumers in the Plaintiff States have not borne a greater burden of Nuclear Tax Payments than consumers in New Hampshire. Therefore, the Plaintiff States cannot be suing to redress discrimination against themselves or their citizens because none has occurred.

The Final Report attempts to avoid this conclusion by stating that, although any refund would be paid to the utilities owning interests in Seabrook, the "[r]efund to the taxpayers (the 12 Seabrook owners) is merely the mechanism through which the states seek to be made whole." Final Report at 41. That conclusion is without support in the record and, thus, the Report is in error.

The Final Report looks to *Maryland v. Louisiana* to support the conclusion that the Eleventh Amendment bar is not applicable, but that reliance is misplaced. In *Maryland v. Louisiana*, consumers in the Plaintiff States had paid the first use tax and a mechanism existed to perfect refunds. When permitting the pass-through of the challenged tax, the Federal Energy

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[20] There can be no question that Connecticut sued on behalf of its utilities because, before January 19, 1993, no Connecticut consumers, including the State government, will pay any Nuclear Property Tax. Stipulation ¶¶ 5.23, 5.24.

Regulatory Commission ("FERC") had expressly provided a refund obligation and mechanism for refund in the event that the tax was invalidated. In this case, the taxpayers sought and received permission from state and federal regulators to include the Nuclear Property Tax in rates in the future. Although the authorizations to include the tax in rates were granted by the Plaintiff States and the FERC, and such grants were after the filing of the complaint in October 1991,[21] none of the regulatory approvals addressed the constitutionality of the tax or provided for a refund if the tax were invalidated.[22] Likewise, there is nothing in the record that would provide a separate mechanism for a refund to the customers of the taxpayers. Thus, there is nothing in the record from which to conclude that a refund would be made to anyone other than the 12 taxpayers for whom the states brought this suit and there is no support for the conclusion of the Special Master that the 12 utilities would act as a conduit in the event of a refund requirement.

In addition to the fallacious assumption that the utilities are merely a conduit to consumers, the Final Report errs in assuming that, if a refund were ordered, all the taxes previously paid by intervenors would flow through to consumers. This assumption is disproved by the record. Nearly half of the Nuclear Property Tax payments have not been included in rates to consumers, and never will be. This is so because the utilities chose to forego complete recovery of the tax. Stipulation ¶¶ 5.9-5.25. In the case of CL&P, for example, the tax has yet to be collected from customers in Connecticut. Stipulation ¶ 5.24. Another joint owner, EUA Power is in bankruptcy and continues to sell its Seabrook power below the cost of production, so it

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[21] The only exception is Canal, which began including the tax in rates before the Complaint was filed. Stipulation in ¶¶ 5.6-5.8.

[22] Two joint owners in the Plaintiff States are not subject to regulation: Hudson and Taunton Municipal Light. Stipulation ¶¶ 5.22, 5.21.

cannot be determined with certainty how much, if any, Nuclear Property Tax has been included in rates to its customers. Stipulation ¶ 5.31.

The tax not paid by the consumers was paid by the utilities' shareholders. With respect to that portion of the tax — nearly half — there is nothing to refund to the customers of the utilities. Moreover, the Plaintiff States have no ability to obtain, and presumably no interest in pursuing, refunds in New Hampshire and Vermont, the home states of utilities owning more than 50% of Seabrook. If the Special Master had considered the amount of any refund that would be received by citizens in the Plaintiff States, he would have found that only about 27% of the tax collected could, in fact, be refunded. In view of the actual amount that would reach the citizens of the Plaintiff States, the Special Master's cursory dismissal of the Eleventh Amendment bar should not be adopted by the Court. Rather, in accordance with the Eleventh Amendment, the Court should not permit the utilities to sue a state in federal court by joining an action commenced by states.

The critical point is that, any claim for a refund in this case is, to a very large extent, a claim by the Intervening Utilities themselves, not a claim by the Plaintiff States or their consumers. The Intervening Utilities may not avoid the Eleventh Amendment bar to recovery of a tax refund that would apply to any action they brought in federal court by themselves. *See Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573 (1946); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945). Their rights as intervenors clearly cannot exceed the rights they would have if they had been entitled to maintain an action in this Court in their own names. *See Arizona v. California*, 460 U.S. 605, 613-614 (1983) (permitting intervention of Indian Tribes in water rights dispute but noting that the Tribes merely sought to participate in the proceeding, not to bring

new claims or issues and that therefore "the States' sovereign immunity protected by the Eleventh Amendment is not compromised").

Intervenors have cited no statute, including 15 U.S.C. § 391, purporting to limit New Hampshire's Eleventh Amendment rights. In *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985), the Court emphasized that, in order to abolish a state's constitutional immunity, "Congress [must] unequivocally express its intention to abrogate the Eleventh Amendment bar to suits against the States in federal court." As the Court observed in *Atascadero*:

> A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment.

473 U.S. at 246.

These authorities establish that the Eleventh Amendment would bar a refund remedy in this case. The discussion of the Eleventh Amendment in *McKesson* is not inconsistent with this conclusion. The *McKesson* Court addressed a very different question — the application of the Amendment in appeals from state court proceedings. The Court's decision that the Eleventh Amendment does not apply to appeals from actions originally brought in state courts is in accordance with the Amendment's language. The decision leaves no doubt about the continued application of the Eleventh Amendment to original suits in federal court. 496 U.S. at 28.

In short, if New Hampshire is unsuccessful in this litigation because of a problem with the credit against the business profits tax, Plaintiffs would be entitled to prospective relief only. Even if some form of retroactive relief were determined to be appropriate, the Eleventh Amendment would bar a refund remedy. And if some type of retroactive remedy is nonetheless

considered, New Hampshire should have the same flexibility to respond to the Court's determination that Florida had in *McKesson*. The recommendation in the Special Master's Final Report that New Hampshire be denied all of these rights should be rejected.

E. This Court Lacks Jurisdiction (Recommendation A)

The majority of this brief addresses the merits of this case and demonstrates that the New Hampshire Nuclear Property Tax system is valid and that the Special Master's conclusion to the contrary was in error. But all of the arguments have to do with a dispute between taxpayers — utilities owning interests in Seabrook — and the State of New Hampshire. Plaintiffs, the States of Connecticut, Massachusetts and Rhode Island are not Nuclear Property Tax payers and their citizens as consumers are not bearing a higher New Hampshire tax burden than consumers in New Hampshire. This important fact deprives the Court of jurisdiction because the original basis on which Plaintiffs sought leave to file the Complaint has now been shown to be erroneous.

Plaintiffs recognized that this Court could exercise original jurisdiction only if this case presented a controversy between two or more states. Because the Plaintiff States are not subject to the Nuclear Property Tax, they had no direct claim against New Hampshire to assert in this Court. Instead, they resorted to an indirect claim — a claim that they and their citizens, as consumers of electricity, were the victims of a discriminatory tax system under which they paid more of the burden of New Hampshire's Nuclear Property Tax than did consumers in New Hampshire. Thus, in their Brief in Support of their Motion For Leave To File The Complaint, Plaintiffs stated:

> In the present case, the tax has been imposed virtually entirely on utility companies which sell electricity at retail to out-of-state consumers, with the ultimate resulting burden falling on the consumers of the electricity generated — that is, on the Plaintiff States and their citizens.

Brief p. 22. Based on such representations, the Court granted leave to file the Complaint.

It is now clear from the record that the representations on which the Court granted leave to file the Complaint are were in error. Consumers in the Plaintiff States are not paying New Hampshire taxes at a higher rate than consumers in New Hampshire. Section V of the Stipulation reveals that PSNH, the New Hampshire Co-op and Granite State each charge consumers in New Hampshire the Nuclear Property Tax. Stipulation ¶¶ 5.14, 5.27. Section V indicates that most of the out-of-state utilities, but not CL&P, are also charging rates which include the Nuclear Property Tax. Stipulation ¶ 5.24.[24] Insofar as the Nuclear Property Tax is concerned, therefore, the Stipulation reveals that there is no discrimination against consumers in the Plaintiff States. If they are served by a joint owner of Seabrook, like consumers in New Hampshire are, they pay or will pay the Nuclear Property Tax in the rates charged for electricity.

With respect to the business profits tax, there is also no evidence of discrimination against consumers in the Plaintiff States. The theory of Plaintiffs' Complaint and Brief in Support of the Motion for Leave to File was that the New Hampshire utilities had or would have larger business profits tax liabilities than the out-of-state owners. In turn, the Plaintiffs alleged that

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[24] UI will only begin including the Nuclear Property Tax in rates on January 19, 1993. Stipulation ¶ 5.23.

New Hampshire utilities would avoid the Business Profits Tax by use of the Nuclear Property Tax credit, thus lightening the tax burden that would otherwise be borne by New Hampshire consumers. The evidence, however, indicates that the New Hampshire utilities owning interests in Seabrook and selling to retail consumers had no business profits tax liability to avoid and that New Hampshire consumers' rates are not being reduced as a result of the Nuclear Property Tax credit. Stipulation ¶ 17.1.

In contrast, the out-of-state utilities selling to consumers in their states did have business profits tax liabilities in the past. Stipulation ¶ 17.1. For the first year in which the New Hampshire tax system was in place, Section VII of the stipulation reveals that the out-of-state utilities were able to use the Nuclear Property Tax credit to reduce the business profits taxes they would otherwise have paid to New Hampshire. Section V of the Stipulation reveals that these tax savings were passed on to consumers in those states. No business profits taxes are included in the rates charged to those consumers because the out-of-state owners of Seabrook expect their liability for business profits taxes to be offset by the Nuclear Property Tax credit. Stipulation ¶¶ 5.6, 5.15, 5.23, 5.24.

Thus, not only is there no discrimination in favor of New Hampshire consumers, but the evidence in the record indicates that out-of-state consumers are experiencing a reduction in the taxes they would otherwise have paid. While New Hampshire consumers paid all of the taxes paid by the New Hampshire utilities, they received no benefit from the credit. Contrary to the indications in support of the Motion for Leave to File the Complaint, there is no basis for a controversy between the Plaintiff States and New Hampshire grounded on disparities in rates charged to consumers of electricity.

But the evidence that no controversy between the states exists is even stronger. The record reveals that New Hampshire

consumers actually incur *higher* New Hampshire tax costs in their rates than do consumers in the Plaintiff States as a result of the inclusion of hypothetical business profits taxes in their rates. Exhibits 10 and 11 to the Document Stipulation establish that the rates charged to retail customers of Granite State have been increased to account for business profits taxes that are not actually paid to New Hampshire. Exhibits 13 and 14 indicate that Northeast Utilities has requested that rates charged to retail customers of PSNH include business profits tax that has not been paid to New Hampshire. The New Hampshire Public Utilities Commission has not yet acted on Northeast Utilities' request.

This evidence, coupled with the facts in Sections V and VII of the Stipulation, was not before the Court when it granted leave to file the Complaint. All of these changed circumstances were described to the Special Master, who did not disagree that they had occurred. In fact, he found that, contrary to the Plaintiff States' original assertions, customers in New Hampshire have borne as much of the burden of the Seabrook Tax as those in Plaintiff States. Final Report at 16. Nonetheless, he dismissed this change in circumstances as an argument on the merits, rather than as a critical fact bearing on the Court's jurisdiction. Final Report at 16. The Special Master's only explanation of the States' interest, given the absence of any discrimination against their consumers, is that, if the utilities prevail in having New Hampshire's tax declared unconstitutional, consumers in the Plaintiff States will benefit. But this benefit, which would also be enjoyed by consumers in New Hampshire, cannot turn this case into a controversy between the states. If it could, any challenge that a utility makes to a tax — or any other fee, license or expense — levied by another state would fall within this Court's original jurisdiction.

New Hampshire submits that the Special Master's conclusion that these changed circumstances have no jurisdictional significance is in error. Had this Court been advised that consumers

in the Plaintiff States pay no higher rates as a result of New Hampshire's tax system than consumers in New Hampshire, it undoubtedly would have considered this fact important when assessing the Court's jurisdiction. Had the Court been advised that at least some New Hampshire citizens actually pay higher New Hampshire tax costs than consumers in the Plaintiff States, it clearly would have had a different view on the question whether the Plaintiff States had cause for complaint. Had the Court been advised that the only Seabrook owners who have benefitted from the credit against the Business Profits Tax are the utilities engaged in interstate sales, rather than intrastate sales, of electricity, assessment of the jurisdictional question could well have been affected. Now that these facts are available, the Court should reconsider the question and should conclude that this case is not a controversy between two or more states over which the Court has original jurisdiction. *See Wyoming v. Oklahoma*, 60 U.S.L.W. 4119, 4122 (1992) (Indicating that a "change in circumstances, whether of fact or law" can call for reconsideration of the decision to grant leave to file an original action.)

H. Conclusion

For the foregoing reasons, the Special Master's Recommendations A through D should be rejected; the Complaints of Plaintiffs, the Intervening Utilities and the amici curiae challenging the Nuclear Property Tax should be dismissed and judgment should be entered in favor of New Hampshire.

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Supreme Court of the United States

October Term, 1992

STATE OF CONNECTICUT,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,

Plaintiffs,

v.

STATE OF NEW HAMPSHIRE,

Defendant.

On Exceptions To The Report Of The Special Master Of December 30, 1992

PLAINTIFF STATES' REPLY BRIEF TO EXCEPTIONS OF THE STATE OF NEW HAMPSHIRE

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QUESTIONS PRESENTED

1. Whether the Court should adopt the Special Master's recommendation that this case remains appropriate for the exercise of the Court's original jurisdiction? (Recommendation A)

2. Whether the Court should adopt the Special Master's recommendation that the Seabrook Tax and Credit violates 15 U.S.C. § 391? (Recommendation B)

3. Whether the Court should adopt the Special Master's recommendation that the Seabrook Tax and Credit violates the Commerce Clause? (Recommendation C)

4. Whether the Court should adopt the Special Master's recommendation that a refund of all Seabrook Tax paid less the credits taken against the Business Profits Tax is the proper remedy? (Recommendation D)

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No. 119, Original

In The

Supreme Court of the United States

October Term, 1992

STATE OF CONNECTICUT,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,

Plaintiffs,

v.

STATE OF NEW HAMPSHIRE,

Defendant.

On Exceptions To The Report Of The Special Master Of December 30, 1992

PLAINTIFF STATES' REPLY BRIEF TO EXCEPTIONS OF THE STATE OF NEW HAMPSHIRE

JURISDICTION

The Motion For Leave To File Complaint invoking the original jurisdiction of this Court was granted on January 27, 1992. The Complaint alleges that this Court has jurisdiction under the Constitution of the United States, Article III, Section 2, clauses 1 and 2, and 28 U.S.C. 1251(a)(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

All relevant constitutional provisions and statutes are contained in the Brief of New Hampshire in Support of

Exceptions to Report of Special Master, 1-2. New Hampshire Rev. Stat. Ann. 83-D ("Tax on Nuclear Station Property") is set out in full in Exhibit A to Plaintiff States' Complaint.

STATEMENT

This suit, brought by the sovereign States of Connecticut, Massachusetts, and Rhode Island against the sovereign State of New Hampshire under the Supreme Court's original jurisdiction, challenges on constitutional and statutory grounds New Hampshire's "Tax on Nuclear Station Property," New Hampshire Revised Statutes Annotated ("R.S.A.") 83-D ("Seabrook Tax"), which also amended R.S.A. 77-A:5.[1] This Tax imposes an *ad valorem* property tax on nuclear power station property, and concomitantly provides a dollar-for-dollar credit against the New Hampshire Business Profits Tax. The intent and necessary effect of this statutory scheme is to discriminate against interstate commerce, and to impose a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce. As such, it violates both the Commerce Clause and 15 U.S.C. § 391, and should be struck down.

A. Background

Effective July 1, 1991, the State of New Hampshire imposed a property tax on nuclear power station property at the rate of 0.64% of the property's valuation, to be assessed annually. R.S.A. 83-D:3; R.S.A. 83-D:4. Since the only nuclear power station in New Hampshire is the Seabrook Station in Seabrook, New Hampshire ("Seabrook Station"), it is the only property subject to the

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[1] The Seabrook Tax, with its credit against the New Hampshire Business Profits Tax, was enacted by 1991 New Hampshire Laws, Chapter 354.

Nuclear Station Property Tax. Stip. ¶ 3.2.[2] Seabrook Station is jointly owned by a number of utility companies located in the States of New Hampshire, Connecticut, Massachusetts, Rhode Island, and Vermont. Stip. ¶ 3.4. These utility owners sell electricity generated at Seabrook Station in both intrastate and interstate commerce to retail customers in their respective service areas in those States, Stip. ¶¶ 3.4, 5.1, and are competitors in the wholesale sale of electricity. Stip. ¶ 5.1.

The Seabrook Tax is imposed on each owner of Seabrook in proportion to that entity's ownership interest in the Seabrook Station. However, as a nonseverable part of the legislation creating the Seabrook Tax, the New Hampshire legislature has provided a dollar-for-dollar credit against the Business Profits Tax, R.S.A. 77-A:5; Stip. ¶ 2.2, which is essentially a tax measured by the income of corporations doing business within the state according to a three-factor apportionment formula. This combination necessarily favors utilities as they conduct business within New Hampshire and effectively penalizes utilities as they conduct business on an interstate basis.

Because the tax is considered a cost of doing business for the utilities, it is passed on and paid through increased rates by their customers, including the plaintiff States and their citizens. Stip. ¶¶ 5.6-5.25. The plaintiff States of Connecticut, Massachusetts, and Rhode Island as consumers of electricity, Stip. ¶ 5.32, and substantial portions of their respective populations, have already been forced to bear the burden of the Seabrook Tax in the rates they pay for their electricity. Stip. ¶¶ 5.5-5.13; 5.15-5.23; 5.32-5.36.

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[2] On September 9, 1992, the parties filed with the Special Master a Stipulation of the Parties and a Stipulation of Exhibits, comprising the record in this case. References to the Stipulation will be to "Stip. ¶ ___."

B. History Of This Litigation

On October 30, 1991, the plaintiff States filed with the Supreme Court a Motion for Leave to File Complaint, invoking the Court's original jurisdiction under Article III, Section 2, clauses 1 and 2 of the United States Constitution, and 28 U.S.C. § 1251(a)(1). Over New Hampshire's objection that the plaintiff States lacked standing to bring the action and that this was not an appropriate case for the exercise of the Court's jurisdiction, (N.H.'s Brief in Opp., 6-13),[3] the Court granted the plaintiff States' motion on January 27, 1992. 112 S.Ct. 962 (1992). On April 27, 1992, the Court assigned the case to the Special Master. 112 S.Ct. 1756 (1992). The Court subsequently permitted intervention by six utility owners of Seabrook Station ("Intervenors"). 112 S.Ct 2961 (1992).

On September 9, 1992, the parties filed with the Special Master a Stipulation of the Parties and a Stipulation of Exhibits, comprising the record in this case. Briefs were submitted, and oral argument before the Special Master was held in Portland, Maine, on December 8, 1992. On December 30, 1992, the Special Master issued his Final Report containing four recommendations:

A. This case remains appropriate for the exercise of the Court's original jurisdiction.

B. The Seabrook Tax and credit violate 15 U.S.C. § 391.

C. The Seabrook Tax and credit violate the Commerce Clause.

D. A refund of all Seabrook Tax paid less the credits taken against the Business Profits Tax is the proper remedy.

Final Report, 14-15.

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[3] References to New Hampshire's Brief in Support of Exceptions to the Final Report will be to "N.H. Brief;" references to New Hampshire's Brief in Opposition to Plaintiffs' Motion for Leave to File Complaint will be to "N.H. Brief in Opp."

On February 1, 1993, the Special Master issued a Supplement to the Final Report, in which he recommended that no interest be added to the recommended refund, or, if interest is awarded, that it be set at the rate prescribed by 28 U.S.C. § 1961.

On March 15, 1993, New Hampshire filed Exceptions to the Recommendations of the Special Master and Brief in Support of Exceptions, urging the Court to reject each of the recommendations of the Special Master, to dismiss the complaints of the plaintiff States and Intervenors, and to enter judgment in favor of New Hampshire. (N.H. Brief, 79).

The plaintiff States now urge this Court to adopt the recommendations of the Special Master to retain its original jurisdiction, to hold that the Seabrook Tax and credit violate 15 U.S.C. § 391 and the Commerce Clause, and to order a refund in accordance with the recommendations in the Final Report.

SUMMARY OF ARGUMENT

I. The Seabrook Tax And Credit Violate The Commerce Clause (Recommendation C)

As the Special Master concluded, the Seabrook Tax and credit violate the Commerce Clause because together they provide preferential tax treatment to companies as they conduct intrastate activities, and place companies that conduct business on an interstate basis at a disadvantage. This preferential treatment of companies as they conduct business activities in New Hampshire violates the Commerce Clause under a number of prior decisions of this Court. *See, e.g., Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984); *Maryland v. Louisiana*, 451 U.S. 725 (1981); *Boston Stock Exch. v. State Tax Com'n.*, 429 U.S. 318 (1977).

The unconstitutionality of this tax scheme is underscored by its lack of "internal consistency." Like the tax schemes held unconstitutional in *Armco v. Hardesty*, 467 U.S. 638 (1984), and *Tyler Pipe Indus. v. Washington Dept. of*

Revenue, 483 U.S. 232 (1987), the New Hampshire tax/credit scheme unconstitutionally places Seabrook owners at risk of multiple taxation to the extent that they conduct business on an interstate basis.

Because the Seabrook Tax/credit scheme is structured to produce this discriminatory effect under every set of circumstances, it discriminates on its face against interstate commerce. The Special Master's Recommendation C should be adopted by this Court.

II. The Seabrook Tax And Credit Violate 15 U.S.C. § 391 (Recommendation B)

The Special Master correctly concluded that the Seabrook Tax and credit violate 15 U.S.C. § 391. The Seabrook Tax is a tax "on or with respect to the generation or transmission of electricity" within the meaning of that statute. As the Special Master recognized, the phrase "with respect to" would be superfluous if New Hampshire's narrow interpretation of the reach of Section 391 were adopted. Final Report, 18.

By definition and in its practical operation, the Seabrook Tax clearly concerns the generation of electricity. The Tax is imposed only on Seabrook Station, which functions solely to generate electricity for distribution, and which is owned by electric utility companies whose business is the distribution of electricity to customers in the New England States. Further, the Tax was enacted for the stated purpose of compensating New Hampshire for potential expenses and risks associated with the generation of electricity through nuclear fusion. R.S.A. 83-D:1. For these reasons, the Seabrook Tax falls within the ambit of Section 391.

Taken together, the Seabrook Tax and credit result in "a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce," in violation of Section 391. The New Hampshire

scheme violates that statute in the same manner and for the same reasons as the New Mexico statute at issue in *Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979), by allowing a "credit for a local tax paid against a separate local tax owed, with a resultant discrimination against interstate commerce." Final Report, 20. The Special Master's Recommendation B should be adopted.

III. The Refunding Of All Seabrook Tax Paid Less Credits Taken Against The Business Profits Tax Is The Proper Remedy (Recommendation D)

The Special Master recommended that the Court apply its decision in this case retrospectively and "order New Hampshire to refund all Seabrook Tax collected by it, reduced by the amounts of Business Profits Tax due as a result of the elimination of the Seabrook Tax credit." Final Report, 39. Under the facts and circumstances of this litigation, such a retroactive application is appropriate.

Far from depending on the creation of a new principle of law, the invalidity of the Seabrook Tax is the result of the application of principles easily derived from a series of cases of this Court in which state taxes have been struck down as favoring in-state interests. Consequently, New Hampshire cannot meet the threshold test of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), and can provide no basis to deny refunds in this case.

Nor does *McKesson v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), counsel otherwise. Through the nonseverability clause in the Seabrook Tax, the New Hampshire legislature has indicated its intent that the Seabrook property tax should fall if the credit provision is held invalid. Also, the Special Master has noted that, since this is an original jurisdiction case, there is no other tribunal to which remand is possible. Final Report, 43.

Lastly, since this case was brought by the plaintiff States on behalf of themselves and a substantial portion

of their general populations, the Eleventh Amendment does not bar a refund. *Maryland v. Louisiana*, 452 U.S. 456, 457 (1981).

IV. The Court Should Retain Jurisdiction In This Case (Recommendation A)

As the Special Master concluded, the plaintiff States have standing to bring this action through injuries incurred in both their proprietary capacities and *parens patriae* capacities. Final Report, 16. Further, a consideration of all of the discretionary factors considered by this Court in determining whether the exercise of original jurisdiction is appropriate counsel for retention of jurisdiction. Final Report, 17. Finally, despite New Hampshire's claim to the contrary, there are no changed circumstances which would warrant a dismissal at this late stage of the case. As the Special Master noted, " . . . this case is, if possible, even more appropriate for the Court's exercise of original jurisdiction than when first accepted." Final Report, 17.

ARGUMENT

I. THE SEABROOK TAX AND CREDIT VIOLATE THE COMMERCE CLAUSE (RECOMMENDATION C)[4]

The Special Master concluded that the Seabrook Tax, with its credit against the Business Profits Tax, is unconstitutional under the Commerce Clause because it "affirmatively places interstate commerce at a disadvantage by giving preferential tax treatment to companies with more significant intrastate activities." Final Report, 28-29. Because this conclusion is correct, the plaintiff States urge this Court to adopt the Special Master's Recommendation

[4] The order of the plaintiff States' Argument conforms to the order of presentation of argument followed by New Hampshire in its brief.

C and hold that the Seabrook property tax and credit are unconstitutional under the Commerce Clause.

A. The Seabrook Tax/Credit Scheme Discriminates On Its Face Against Interstate Commerce.

The Seabrook Tax violates the Commerce Clause because it "unquestionably discriminates against interstate commerce in favor of local interests as the necessary result of [its] tax credit[] [provision]." *Maryland v. Louisiana*, 451 U.S. 725, 756 (1981). In fact, the entire Seabrook Tax scheme, with its credit against the New Hampshire Business Profits Tax, is similar to schemes found to violate the Commerce Clause in *Maryland v. Louisiana* and *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984), and should be struck down for the same reasons.

In the area of taxation, the fundamental principle of the Commerce Clause[5] to which this Court has unwaveringly adhered is that "[n]o state, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.' " *Boston Stock Exch. v. State Tax Com'n*, 429 U.S. 318, 329 (1977) (quoting *Northwestern States Portland Cement v. Minnesota*, 358 U.S. 450, 458 (1959)). *See also Westinghouse Elec. Corp. v. Tully*, 466 U.S. at 403; *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963). It is precisely this feature of the Seabrook Tax Package structure – its inevitable and intentional discrimination against interstate commerce – that renders it unconstitutional.

A state tax on an activity of interstate commerce will be sustained against Commerce Clause challenge if it "(1)

[5] The Commerce Clause, "even without implementing legislation by Congress is a limitation upon the power of the States, including the States' power to tax." *Westinghouse Elec. Corp. v. Tully*, 466 U.S. at 403 (citations and internal quotation marks omitted).

has a substantial nexus with the State; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the State. *Washington Revenue Dept. v. Washington Stevedoring Assn.*, 435 U.S. 734, 750, 98 S.Ct. 1388, 1399, 55 L.Ed. 2d 682 (1978)." *Maryland v. Louisiana*, 451 U.S. at 754. *See also, Complete Auto Transit v. Brady*, 430 U.S. 274, 277-78 (1977). It is the third of these factors that the Seabrook Tax violates.

The discriminatory structure of the Seabrook Tax operates as follows. Section 1 of Chapter 354 of the New Hampshire Acts of 1991 (codified as New Hamp. R.S.A. 83-D) imposes an *ad valorem* tax upon the value of the Seabrook Nuclear Station at the rate of 0.64 percent of valuation upon each entity with an ownership interest in Seabrook in proportion to that interest. R.S.A. 83-D:2; 82-D:3; 83-D:4; 83-D:5. Standing alone, this tax appears to apply evenhandedly. However, the Seabrook Tax goes on to provide a dollar-for-dollar credit of the *ad valorem* tax against the Business Profits Tax, which is essentially a tax measured by the income of corporations doing business within the State, according to a three-factor statutory apportionment formula. R.S.A. 83-D:6; R.S.A. 77-A:3.[6]

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[6] R.S.A. 77-A:3, as amended by chapter 354:7 of the 1991 New Hampshire Laws, provides that, for purposes of the New Hampshire Business Profits Tax, income of corporations doing business within New Hampshire shall be apportioned as follows:

> The percentage of value of the total real and tangible personal property owned, rented and employed by the business organization everywhere as is owned, rented and employed by it in the operation of its business in New Hampshire, plus the percentage of total compensation paid by the business organization to employees everywhere as is paid by the business organization to employees for services rendered within New Hampshire, plus 1.5 times the percentage of the total sales, including charges for services, made by the business organization everywhere, divided by 3.5.

Under this formula, the more business activities, defined in terms of property, sales, and payroll, that a corporation conducts in New Hampshire, the greater is its potential Business Profits Tax liability, and the more valuable the credit becomes. What makes this combination invidious is its inevitable – and intended – effect of favoring Seabrook utility owners doing substantial business within New Hampshire over utility owners doing substantial business in other States, and the necessary pressure this exerts on these owners of Seabrook to shift their business activities to New Hampshire in order to benefit more fully from the credit. As conceived by the New Hampshire Legislature,[7] this combination of tax and

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[7] The favoritism that was a legislative motivation in enacting the Seabrook Tax/credit scheme is demonstrated by the remarks of the chairman of the legislative subcommittee that drafted the Seabrook Tax on the floor of the House:

> If you do the math to work this out, you'll see that over 14 million dollars is paid by out-of-state interests; and you can conclude that they are indeed are [sic] financing this increase in the utility taxes that we're going to pay. Over the seven-year term of the rate agreement, I am assured by those who know that this will have no increase or negligible increase in [New Hampshire] rates, that you will not be able to see this in the negotiated five and a half per cent rate increase which this House has approved. . . . I would say that this is a tax in the *New Hampshire tradition of finding some way for the other fellow to pay.*

Remarks of Representative Robert Hayes, Chairman of the Legislative Sub-committee which drafted the Seabrook Tax. New Hampshire House of Representatives Floor Debate Re: H.B. 64, April 2, 1991, pp. 25-26 (emphasis added).

This same intent was expressed in the New Hampshire Senate, as exemplified by the statement of Senator Russman during Senate debates:

credit necessarily means that to the extent that a Seabrook owner does business in New Hampshire, it will pay only one of the two taxes (property and business profits) to the point that the credit is exhausted. To the extent that an owner engages in business outside of New Hampshire, it runs the risk of paying both taxes: the Nuclear Station Property Tax and a tax on its corporate income or profits to the other State or States in which it operates.[8] This tax/credit combination has the effect of treating differently Seabrook owners that are similarly situated in all respects except for the percentage of their business activities conducted in New Hampshire. *See Westinghouse Elec. Corp. v. Tully*, 466 U.S. at 400. This discrimination is inimical to the very purpose of the Commerce Clause, which was to create a national free market in which commerce could flow unimpeded by local protectionism, *Boston Stock Exch. v. State Tax Com'n*, 429 U.S. at 328, and in which "State boundaries [are] a neutral factor in economic decision making." *American Trucking Assoc. Inc. v. Scheiner*, 483 U.S. 266, 283 (1987).

The necessary result of the structure of this tax/credit scheme, *under every set of circumstances*, is that businesses receive preferential treatment, and ultimately a competitive advantage,[9] as they conduct in-state

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> "It [Seabrook Tax] generates an incredible amount of revenue, given what it is, at *essentially no cost to the State of New Hampshire.*"

New Hampshire Senate Floor Debate Re: H.B. 64, May 29, 1991, page 3 (emphasis added).

[8] In fact, this "risk" is actual. Each of the owners of Seabrook Station is subject to taxation by other states, including the States of Connecticut, Massachusetts, and Rhode Island on their business profits that are attributable to those states. Rhode Island General Laws, §§ 41-13-1 *et seq.*; Massachusetts General Laws Annotated, Chapter 63, Section 52A; Connecticut General Statutes, §§ 12-213, *et seq.* Stip. ¶ 2.4.

[9] The utility joint owners of Seabrook are actual or potential competitors in the wholesale sale of electricity. Stip. ¶ 5.1.

activities, while businesses are penalized by the risk (and reality) of multiple taxation as they conduct out-of-state activities. There is no other outcome that can occur under the terms of the Seabrook Tax itself. Because the credit is valuable *only* to the extent that an owner conducts business activities in New Hampshire, an owner of Seabrook that conducts all of its business activities in New Hampshire will *never* have to pay two separate taxes (Nuclear Property Tax and Business Profits Tax, up to the amount of the credit), while an owner of Seabrook that conducts business activities out-of-state will *always* be at risk of paying two taxes (the New Hampshire Nuclear Property Tax and the Business Profits Tax in the state of activity). This discrimination could not be any plainer, and the necessary pressure that this fact exerts on businesses to shift business activities into New Hampshire to avoid this effect is patently unconstitutional under the prior decisions of this Court.

Contrary to New Hampshire's claim (N.H. Brief, 64), the plaintiff States do not ask this Court to declare "a new rule of law" or to expand Commerce Clause jurisprudence into areas hitherto unknown in order to arrive at this result. In fact, far from seeking an expansion of Commerce Clause jurisprudence, the plaintiff States seek to invoke the principles underlying numerous cases of this Court which found discrimination against interstate commerce in tax structures that necessarily favored intrastate business activities over interstate activities, and whose effect was to protect in-state business and to encourage companies to shift business into the offending State in order to benefit from the advantages and avoid the penalties created by the tax system. *See, e.g., Boston Stock Exch. v. State Tax Com'n*, 429 U.S. at 332, striking down a New York tax scheme that resulted in a greater tax on stock transactions involving out-of-state sales than most transactions involving in-state sales; *Maryland v. Louisiana*, 451 U.S. at 759, striking down a Louisiana tax scheme in which a series of tax credits and exemptions transformed an ostensibly neutral tax into one favoring

local interests and encouraging gas companies to invest in exploration in Louisiana as opposed to other States; *Westinghouse Elec. Corp. v. Tully*, 466 U.S. at 406, striking down a tax whose accompanying credit for in-state activities had the result of favoring local business and pressuring businesses into shifting business activity into New York; *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), striking down a West Virginia tax that resulted in companies engaging in both manufacturing and sales within the State to pay only one tax, while exposing out-of-state manufacturers making West Virginia sales to two taxes; *Tyler Pipe Industries v. Washington Dept. of Revenue*, 483 U.S. 232 (1987), striking down a Washington Tax scheme that resulted in the same effect as the tax in *Armco*, but was structured in the reverse; and *American Trucking Assoc. Inc. v. Scheiner*, 483 U.S. 266, striking down a Pennsylvania tax that resulted in a higher effective tax on out-of-state truckers traveling within Pennsylvania, thereby exerting an inexorable pressure on "interstate businesses to ply their trade within the State that enacted the measure rather than 'among the several States.'" *Id.* at 286-87.

These cases stand foursquare for the principles invoked by the plaintiff States: that tax schemes, no matter how they are labeled, are invalid under the Commerce Clause when they result in a greater tax burden, or risk of a greater tax burden, on businesses as they conduct business activities on an interstate basis rather than an intrastate basis, thereby resulting in a pressure to undermine tax-neutral business decisions and shift business activity into the taxing State.[10] That is precisely the situation

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[10] As the Special Master noted, Final Report, 32, the recent merger of Public Service of New Hampshire ("PSNH") with Northeast Utilities ("NU") illustrates the pressure that is inherent in the Seabrook Tax. Businesses can succumb to this pressure by buying or merging with businesses in New Hampshire as well as by shifting activities into the state. Either way, the pressure exerted by the tax scheme unconstitutionally forecloses tax-neutral decision-making in economic and commercial matters, thereby violating the Commerce Clause. *Westinghouse Elec. Corp. v. Tully*, 466 U.S. at 406.

created by the Seabrook Tax, and it is unconstitutional for precisely the same reasons.

The Seabrook Tax is similar to the tax schemes struck down in *Maryland v. Louisiana* and *Westinghouse Elec. Corp. v. Tully*. In *Maryland v. Louisiana*, Louisiana created a tax scheme which imposed a tax on the "First Use" of gas imported into the state. Although this tax was theoretically imposed on all owners of such gas at an equal rate, a number of exemptions and credits effectively exempted most in-state owners and consumers from the major portion of the tax. This Court struck the entire provision down as discriminating against interstate commerce. Rejecting Louisiana's request that it consider the First Use tax alone, the Court ruled that "[a] State tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme." *Maryland v. Louisiana*, 451 U.S. at 756. When it viewed the tax in conjunction with the credits, the Court concluded that "the obvious economic effect" was to encourage natural gas owners to invest in mineral exploration and production in Louisiana rather than in other States, *id.* at 757, and to protect substantially in-state producers and consumers of gas from the impact of the tax. *Id.* at 757-58. This inequality of treatment was a clear violation of the Commerce Clause.[11]

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[11] The Court in *Maryland* rejected the Special Master's recommendation that further hearings be conducted in order to determine the extent of the discrimination, holding "We need not know how unequal the Tax is before concluding that it unconstitutionally discriminates." *Maryland v. Louisiana*, 451 U.S. at 760. *See also Wyoming v. Oklahoma*, 112 S.Ct. 789, 799 (1992); *New Energy Company of Indiana v. Limbach*, 486 U.S. 269 (1988).

Similarly, in *Westinghouse Elec. Corp. v. Tully*, New York imposed a franchise tax on corporations, to include the income of subsidiaries engaged in the export of goods, but then provided a partially-offsetting credit for receipts from exports shipped from a New York place of business. No such credit was provided for products shipped from outside New York. Although the plaintiff in that case, Westinghouse Electric Corporation, actually received a partial credit for that portion of its receipts attributable to exports shipped from New York, it contested the entire tax/credit structure as discriminatory under the Commerce Clause. The Court agreed, holding that the credit provision favored in-state activity over out-of-state activity, creating a strong incentive for corporations to shift a greater percentage of their shipping activities into New York in order to avail themselves of a higher credit. *Westinghouse*, 466 U.S. at 405-06. The fact that the credit was also available to Westinghouse did not save the tax. In fact, the pressure that it created on Westinghouse and other businesses to do more business within New York rather than "among the several States" was precisely the tax's undoing. The New Hampshire tax scheme operates in the same manner, and is unconstitutional for the same reason.

Contrary to New Hampshire's assertions (N.H. Brief, 47), the Seabrook Tax is not rendered any less discriminatory because all the Seabrook utility owners may claim the credit against the New Hampshire Business Profits Tax. New Hampshire has structured the tax so that utilities may benefit from the credit only to the extent that they conduct their business activities in New Hampshire, thereby rewarding corporations for in-state business activities and effectively penalizing them for out-of-state activities. As was the case in *Boston Stock Exchange*, *Maryland v. Louisiana*, and *Westinghouse v. Tully*, the fact that all owners can utilize the credit to the extent that they conduct or shift business into New Hampshire does not *defeat*

the plaintiff States' claim of unconstitutionality; it *establishes* it.[12]

B. The Seabrook Tax/Credit Scheme Is Not Internally Consistent.

The unconstitutionality of this tax scheme is underscored by its lack of "internal consistency." This Court first expressly applied the requirement of internal consistency in *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983), in the context of proper apportionment of taxes under the second *Complete Auto* factor, and has more recently required it in State taxes which, like the Seabrook Tax scheme, facially discriminate against interstate commerce. *See e.g., American Trucking Ass'ns. Inc. v. Scheiner*, 483 U.S. at 284-86; *Tyler Pipe Indus. Inc. v. Washington Dept. of Revenue*, 483 U.S. at 240-43 (implicitly); *Armco Inc. v. Hardesty*, 467 U.S. at 644-45.

As the Court explained in *Armco*:

> In *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 169, 103 S.Ct. 2933, 2942, 77 L.Ed.2d 545 (1983), the Court noted that a tax must have "what might be called internal consistency – that is the [tax] must be such that, if applied by every jurisdiction," there would be

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[12] In fact, the unconstitutionality here is even more apparent than in *Westinghouse*. In *Westinghouse*, the tax and the credit were self-contained, whereas the Seabrook Tax involves a cross-credit between two non-compensating unrelated taxes, with the payment of one tax relieving the obligation of another tax. Significantly, New Hampshire does not even attempt to justify the linkage of the two taxes by claiming that one compensates for the other. *See Tyler Pipe*, 483 U.S. at 242-44; *Armco v. Hardesty*, 467 U.S. at 642-43; *Maryland v. Louisiana*, 451 U.S. at 759.

Contrary to New Hampshire's apparent suggestion (N.H. Brief, 29-30), the fact that the two taxes (property tax and Business Profits Tax) are not compensating does not help New Hampshire's argument; rather, it emphasizes the glaring unconstitutionality of its tax scheme.

> no impermissible interference with free trade. In that case, the Court was discussing the requirement that a tax be fairly apportioned to reflect the business conducted in the State. A similar rule applies where the allegation is that a tax on its face discriminates against interstate commerce.
>
> *Id.* at 644.

Under this analysis, when examining a tax scheme like New Hampshire's that discriminates on its face against interstate commerce, the Court hypothesizes that every State employs the same taxing scheme as the one under scrutiny. The Court then determines whether a taxpayer would be subject to the risk of multiple taxation if it were to conduct business under this taxing scheme on an interstate basis rather than solely on an intrastate basis. If it would, then the taxpayer need not prove actual discriminatory impact by demonstrating that it is subject to a higher tax burden due to the tax structures of other States. *Tyler Pipe Indus.*, 483 U.S. at 247; *Armco*, 467 U.S. at 644. Rather, the risk of multiple taxation thus created is sufficient to establish the scheme's unconstitutionality. As this Court has explained:

> Any other rule would mean that the constitutionality of [a State's] tax laws would depend on the shifting complexities of the tax codes of 49 other States, and that the validity of the taxes imposed on each taxpayer would depend on the particular other States in which it operated.
>
> *Id.* at 644-45 (footnote omitted).

For example, in *Armco*, West Virginia imposed a tax on manufacturing performed in West Virginia, and a separate tax on the gross receipts of companies selling tangible property at wholesale in the state. However, the sales or wholesaling tax created an exemption for West Virginia manufacturers. Therefore, the necessary result of this tax structure was that companies which both manufactured goods and made wholesale sales within West Virginia were subject to only one tax (the manufacturing

tax), while those which manufactured out-of-state but sold at wholesale within West Virginia were at risk of paying two taxes: the West Virginia wholesale tax, plus a manufacturing tax to its home State.

Armco, the plaintiff, was not required to prove that it had actually been subjected to two taxes. Rather, the Court assumed for purposes of its analysis that Ohio, Armco's home State, imposed a manufacturing tax identical to West Virginia's, and concluded that the risk of multiple taxation engendered by the West Virginia scheme was sufficient to render it unconstitutional. *Id.*

Similarly, in *Tyler Pipe*, the State of Washington imposed a multiple activities tax on the activities of manufacturing and selling at wholesale within the state, but exempted local manufacturers from the manufacturing tax to the extent that they paid the wholesale tax. The result was that in-state manufacturers who made wholesale sales within Washington paid only one tax, while in-state manufacturers making out-of-state sales, or out-of-state manufacturers making in-state sales, were at risk of paying two taxes.

In finding the Washington tax unconstitutional, the Court assumed that other States imposed a similar tax scheme, and concluded that the risk of multiple taxation for businesses operating on an interstate basis created the same fatal flaw as did the West Virginia tax scheme in *Armco. Tyler Pipe Indus. v. Washington Dept. of Revenue*, 483 U.S. at 248.

The Seabrook Tax operates in a parallel manner, and New Hampshire's assertion that its tax scheme "bears no relation to the taxes invalidated in *Armco* or *Tyler Pipe*" (N.H. Brief, 38) is flatly contradicted by a comparison of the tax structures.

New Hampshire imposes a property tax on the utility owners of Seabrook Station, which "manufactures" or generates electricity in New Hampshire, plus a Business Profits Tax on income apportioned to New Hampshire, measured by property, payroll, and sales attributed to New Hampshire, with an extra emphasis on in-state sales.

As the Special Master found, assuming that other States had the same tax system, the Seabrook Tax/credit combination ensures that Seabrook owners operating entirely intrastate will pay only the property tax and will effectively be exempted from the Business Profits Tax (to the extent of the credit), while Seabrook owners conducting some or all of their business activities (other than ownership of Seabrook Station) outside of New Hampshire will be subject to two taxes: the Seabrook Property Tax and the Business Profits Tax of the other State or States in which their activities are conducted. Final Report, 37-38. The Seabrook Tax structure is thus the parallel of the West Virginia tax structure found unconstitutional in *Armco*, as well as the similar scheme found unconstitutional in *Tyler Pipe*.

New Hampshire's claim that the Special Master, in evaluating the internal consistency of the Seabrook Tax, made "an incorrect assumption" (N.H. Brief, 36-37), demonstrates its fundamental misunderstanding of the concept itself. The Special Master assumed that every State had adopted a tax scheme in which it "allow[ed] a credit for taxes on local nuclear property only against taxes on local business profits," and concluded that, in such an event,

> utilities owning "nuclear property" in one State but earning part of their income elsewhere would face a risk of multiple taxation not faced by utility owners conducting all of their business activity within a single State. Seabrook owners earning profits on business activity only in New Hampshire pay only one tax up to the level of the Seabrook Tax. In contrast, Seabrook owners earning equivalent profits from business activity in part elsewhere, but owning no other nuclear property, are subject to two taxes, the Seabrook Tax plus a business profits tax owed to other States.

Final Report, 37.

This assumption is the correct one, and is similar to assumptions that this Court made in both *Armco* and *Tyler Pipe*. In arguing otherwise, New Hampshire first misstates and then belittles the Special Master's hypothesis by claiming that it requires an assumption that "other States would impose nuclear property tax systems but would have no nuclear property within their borders." (N.H. Brief, 37). Clearly, that is not part of the Special Master's assumption at all. What New Hampshire seeks to do is to inject additional assumptions into the test, *viz.*, that each utility owning nuclear property in New Hampshire would also own nuclear property in every other State in which it conducts business, and would pay a tax on that property sufficient to offset any tax it would owe to that State on its income. Not only do these additional assumptions change the actual situation with the Seabrook Tax, it also is contrary to the analyses engaged in by this Court in *Armco* and *Tyler Pipe*.[13]

The Special Master correctly concluded that, like the tax scheme in *Armco*, *Tyler Pipe*, and *Scheiner*, "[t]he Seabrook Tax and credit scheme, if imposed in every State, would have a similar effect of imposing a severe financial burden on those utilities holding nuclear properties in several States and unable to use their full tax credits in each State." Final Report, 38.

This conclusion is correct and supports the Special Master's Recommendation C that the Seabrook Tax and credit violate the Commerce Clause.

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[13] In both *Armco* and *Tyler Pipe*, the Court hypothesized that all states imposed a tax on manufacturing and a tax on wholesaling. It did not also assume that each state provided a discriminatory exemption for in-state manufacturers that would offset its liability under one of the taxes. Yet New Hampshire argues that the Special Master erred by not making that additional assumption.

C. New Hampshire's Exceptions In Its Brief Are Premised On Its Mischaracterization Of The Nature Of The Seabrook Tax And Its Misapplication Of The Law.

1. In its brief in support of its exceptions to the Final Report, New Hampshire repeatedly misstates the plaintiffs' arguments and the Special Master's analysis, and misapplies the relevant law. But its most serious flaw, which underlies and ultimately distorts its entire argument, is its mischaracterization of the nature of the Seabrook Tax with its concomitant credit against the Business Profits Tax. New Hampshire attempts to separate the two elements of the tax scheme and ignore the fact that the elements are linked inseverably through the language of the credit provision and the express mandate of the Legislature's non-severability clause.[14] Thus, New Hampshire discusses at length cases upholding *ad valorem* property taxes (N.H. Brief, 14-17), and then separately addresses the right of a State to tax properly apportioned income of corporations doing business within its borders. (N.H. Brief, 33-35). In making its argument in this manner, New Hampshire either deliberately or inadvertently misstates the plaintiff States' challenge to the tax, which is that the *linkage* of the property tax and the business profits tax by means of the credit creates an unconstitutional advantage for businesses conducting business on an intrastate basis and a concomitant disadvantage for

[14] 1991 New Hampshire Laws ch. 354, § 19 provides:
Nonseverability. It is the intent of the legislature that sections 1 and 2 [creating the nuclear property tax and credit] of this act be considered a unit and their provisions inseparable. If any provision of sections 1 and 2 of this act is declared unconstitutional, then sections 1 and 2 and all of their provisions shall be invalid.

businesses as they operate, and precisely to the extent that they operate, on an interstate basis.[15]

Consequently, New Hampshire's discussion of cases dealing with *ad valorem* property taxes standing alone, or with properly apportioned income taxes, is irrelevant to the issues before this Court. The plaintiff States have never claimed that an *ad valorem* property tax falls outside the legitimate taxing authority of a State, despite New Hampshire's apparent claim to the contrary. (N.H. Brief, 14-20). Nor do the plaintiff States question the authority of States to impose taxes on the properly apportioned income of businesses operating within their borders. What the plaintiff States do claim, however, is that *any* tax, no matter how labeled, that imposes a burden on interstate commerce must be assessed in light of the four-factor test of *Complete Auto Transit, Inc. v. Brady*, and that the Seabrook Tax, which consists of *both* the *ad valorem* property tax *and* the nonseverable credit against the Business Profits Tax, cannot satisfy the third *Complete Auto*

[15] New Hampshire disingenuously describes the credit as simply a "decision not to tax a portion of the business profits that it is clearly entitled to tax," (N.H. Brief, 34-35) and an after-the-fact "excess profits tax." (N.H. Brief, 12). New Hampshire's label does not change the consitutional flaw in its credit scheme. The credits at issue in *Maryland, Westinghouse, Armco, Tyler Pipe, Boston Stock Exch.* could likewise have been labeled "decisions not to tax," but that label would not have changed the result in those cases.

Whatever may have been the constitutional ramifications if New Hampshire had simply repealed its Business Profits Tax or enacted an excess profits tax is unknown, and not before the Court in this case. The fact is, New Hampshire took neither of these options, but instead linked two local taxes by a credit which favors local business activities. This distinction is one of constitutional significance. *See American Trucking Assoc. Inc. v. Scheiner*, 483 U.S. at 305 (Scalia, J., dissenting). It is this system – the one New Hampshire *actually* created – that the plaintiffs have challenged, and that the Special Master concluded was unconstitutional.

factor because it discriminates against interstate commerce.[16]

2. New Hampshire argues that the likelihood that a Seabrook owner would shift business activities to New Hampshire in order to benefit from the credit is "completely unrealistic." (N.H. Brief, 41 n. 19). The identical argument was expressly rejected by the Court in *Boston Stock Exch.*, 429 U.S. at 334 n. 13:

> Even if the tax is not now the sole cause of New York residents' refusal to trade on out-of-state exchanges, at the very least it reinforces their choice of an in-state exchange and is an inhibiting force to selling out of State; that inhibition is an unconstitutional barrier to the free flow of commerce.

3. New Hampshire argues at length that, if the Seabrook Tax scheme is held to be unconstitutional, then "[a] large number of tax credits that have long been widely used by the States would be vulnerable." (N.H. Brief, 49). The Court in *Westinghouse* and *Boston Stock Exchange* flatly rejected similar arguments. *Westinghouse*, 466 U.S. at 406 n. 12;[17] *Boston Stock Exchange*, 429 U.S. at 336-37.

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[16] New Hampshire incorrectly suggests that the plaintiff States' challenge to the constitutionality of the Seabrook Tax is an attempt by the utilities and ultimately their customers to avoid paying "their fair share" of taxes to New Hampshire (N.H. Brief, 9, 11, 20). The plaintiff States have never challenged New Hampshire's authority to tax; they have simply and consistently challenged New Hampshire's authority to tax on an unconstitutional basis.

[17] New Hampshire miscites this passage in *Westinghouse*, focusing on the portion that says "it is not the provision of the credit that offends the Commerce Clause," and somehow ignoring the impact of the following phrase, "but the fact that it is allowed on an impermissible basis." (N.H. Brief, 5, 48-49). It has consistently been the plaintiffs' claim, which was endorsed by the Special Master, that the credit in this case is effectively

Any credit challenged must be evaluated according to Commerce Clause principles. If a credit does not violate these principles, then it will not run afoul of the Commerce Clause.

4. New Hampshire claims that no discrimination has been demonstrated because some non-New Hampshire utilities have benefited from the credit while the New Hampshire utilities, Public Service of New Hampshire ("PSNH"), EUA Power Corporation, and New Hampshire Coop, have realized no profits since the Seabrook Tax was enacted, and have been unable to benefit from the credit thus far. (N.H. Brief, 52-54). This argument misses the point of the plaintiffs' challenge and the Special Master's recommendations.

As discussed above, due to the inherent nature of the Business Profits Tax, the Seabrook credit can only be valuable to the extent that an owner conducts business activities in New Hampshire. New Hampshire's argument that the value of the credit turns on the level of a company's profitability is thus misleading. Clearly, the value of the credit turns, in the final analysis, on the extent that a company conducts business activities within New Hampshire. No matter how profitable a company is in the aggregate, its use of the credit depends on the extent of its business activities in New Hampshire.[18]

The Court should reject New Hampshire's attempt to hinge the constitutionality of the Seabrook Tax on the level of profitability of the utilities. Obviously, a statute's

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allowed on an impermissible basis, *i.e.*, on the basis of the extent of a utility's business activities within New Hampshire.

[18] This principle is illustrated by the example used by the Special Master of two owners similarly situated in all respects except for the amount of income allocated to New Hampshire, based on the percentage of business activities performed there. It is clear from this example that the owner that operates solely intrastate enjoys a distinct tax advantage over the owner that operates on an interstate basis, despite the fact that the two owners have the same level of profits. Final Report, 22-24, 29.

facial constitutionality cannot turn on something so ephemeral as the amount of money a particular corporation earns in a particular year, any more than it can turn on "the shifting complexities of the tax codes of 49 other States." *Armco, Inc. v. Hardesty*, 467 U.S. at 645. The statute cannot be constitutional so long as PSNH is insolvent and become unconstitutional the day PSNH shows a profit. The Special Master recognized this when he found that "the Seabrook Tax credit 'backstopped' any intrastate utility, *guaranteeing* that, no matter what its profits picture or tax status, its intrastate customers would pay only one tax up to the point of the full Seabrook Tax paid." Final Report, 22 (emphasis in original).

Rather, the facial constitutionality of the Seabrook Tax must be determined by its structure: the operation of the tax and credit *as structured* necessarily provides a benefit to owners *as they conduct their business activities in New Hampshire*. The value of the credit is thus a function of the location of the business activities, not the State of incorporation of the business. Concomitantly, the operation of the tax structure subjects Seabrook owners to the risk and reality of multiple taxation *to the extent that* they conduct their business activities "among the several States," and necessarily exerts a pressure on these owners to conduct these activities in New Hampshire in order to realize the benefit and avoid the burden. Since this is the only result of the tax under any circumstances, the Seabrook Tax on its face discriminates against interstate commerce in violation of the Commerce Clause and should be struck down.

II. THE SEABROOK TAX AND CREDIT VIOLATE 15 U.S.C. § 391 (RECOMMENDATION B)

In Recommendation B of the Final Report, the Special Master concluded that the Seabrook Tax and credit violate 15 U.S.C. § 391 ("Section 391"), the federal statutory provision prohibiting state taxes that discriminate against

electricity generated and transmitted in interstate commerce.[19] The Special Master found, first, that the Seabrook Tax is a tax "on or with respect to" the generation or transmission of electricity within the meaning of Section 391, notwithstanding that the tax takes the form of an *ad valorem* tax on property. He found, next, that the Tax and credit discriminate against electricity generated and transmitted in interstate commerce, in violation of Section 391. Both conclusions are correct, and this Court should adopt Recommendation B and declare that the Seabrook Tax and credit violate Section 391.

A. The Special Master Correctly Concluded That The Seabrook Tax Is A Tax "On Or With Respect To The Generation Or Transmission Of Electricity" Within The Meaning Of 15 U.S.C. § 391.

The Special Master rejected New Hampshire's argument that Section 391 does not apply to the Seabrook Tax merely because it takes the form of an *ad valorem* tax on property, concluding correctly that the Tax falls within the federal statute's broad prohibition on discriminatory taxes "on or with respect to" the generation or transmission of electricity. Emphasizing that the Seabrook Tax imposes a tax exclusively on property that is defined

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[19] 15 U.S.C. § 391 (1988) (the codification of Section 2121(a) of the Tax Reform Act of 1976), provides:

> No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-state manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

solely by reference to its use in producing or distributing electricity, the Special Master correctly concluded that, notwithstanding its form as a property tax, the Seabrook Tax "is in substance and reality a tax 'with respect to' generation or transmission of electricity" within the meaning of Section 391. Final Report, 19.

The Special Master's conclusion that the Seabrook Tax falls within Section 391 is consistent with the broad language of the statute.[20] The phrase "on or with respect to" evidences Congress' intent broadly to proscribe any discriminatory state tax affecting generation or transmission of electricity, not only those taxes that are imposed directly "on" generation or transmission. As the Special

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[20] As the Special Master found, in the leading case interpreting Section 391, *Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979), the Court did not have occasion to address the meaning of the phrase "on or with respect to," since the New Mexico tax at issue there – a tax on "any person generating electricity" in New Mexico, measured by the volume of electricity generated (*see* 441 U.S. at 143 n. 4) – was "concededly a tax on the generation of electricity." 441 U.S. at 149.

The legislative history of Section 391 does not shed light on the meaning of the phrase "on or with respect to." As the Court explained in *Snead*, the original House bill adopting the Tax Reform Act of 1976 did not contain the provision that was subsequently codified as Section 391. 441 U.S. at 146-47. The Senate Finance Committee added the provision, *see* 441 U.S. at 146-47, which from the time of its origination contained the phrase "on or with respect to" the generation of electricity. *See* H.R. 10612, § 1323; S. Rep. No. 938, pt. I, pp. 437-38, 94th Cong. (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 3439, 3865-66. Subsequent amendments to the provision did not alter or otherwise relate to the phrase "on or with respect to the generation or transmission of electricity." S. Rep. No. 1236, 94th Cong. (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 4118, 4206. The Congressional debates concerning the provision similarly did not contain any discussion of the phrase. *See* 122 Cong. Rec. 32770 (July 26, 1976); 122 Cong. Rec. 24324-429 (July 28, 1976).

Master recognized, the phrase "with respect to" would be superfluous if the statute were construed too narrowly. Final Report, 18. As he further noted, the breadth of the language "on or with respect to" is echoed in the statute's broad definition of discrimination to include both taxes that "directly" and "indirectly" result in a greater tax burden on electricity in interstate commerce. *Id.* Moreover, Congress' choice of the words "with respect to" is indicative of its intent that the provision be construed broadly. That phrase "customarily signals broad application." *Id. See also Morales v. Trans World Airlines*, ___ U.S. ___, 112 S.Ct. 2031, 2036-37 (1992) (broadly construing phrase "relating to" in preemption provision of Airline Deregulation Act); *Ingersoll-Rand Co. v. McClendon*, ___ U.S. ___, 111 S.Ct. 478, 482-83 (1990) (use of the phrase "relate to" in ERISA preemption provision evidenced Congress' intent as to breadth of ERISA preemption).

The Seabrook Tax clearly falls within Section 391's broad prohibition of discriminatory taxes "on or with respect to" the generation or transmission of electricity. By its very terms, the Tax falls exclusively on property defined solely by reference to its use in generating and transmitting electricity; the tax defines "nuclear station property" (the only property subject to the tax) as property used "in generating, producing, supplying and distributing electric power or light from the fission of atoms, exclusive of transmission lines." R.S.A. 83-D:2.[21] The Tax does not fall on property used for any other purpose. Although New Hampshire throughout its brief attempts

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[21] The full text of the provision defines "nuclear station property" as:

> land, buildings, structures, tunnels, machinery, dynamos, apparatus, poles, wires, nuclear fuel and fixtures of all kinds and descriptions used in generating, producing, supplying and distributing electric power or light from the fission of atoms, exclusive of transmission lines.

R.S.A. 83-D:2.

to depict the Tax as a common property tax, even it concedes that the Tax was imposed because of concerns over the activity conducted on the property, *i.e.*, the generation of electricity through nuclear power. (N.H. Brief, 6-8). It is that activity to which Section 391 is addressed.

In its practical operation as well, the Tax clearly concerns generation and transmission of electricity. The Seabrook Station, the only "nuclear station property" in New Hampshire, generates electricity for distribution in New England. Stip. ¶¶ 3.2, 3.3, 6.6-6.15. The Tax is paid by electric utility companies (the joint owners of Seabrook) whose business is the distribution of electricity generated at Seabrook to wholesale and retail customers in New England, including the plaintiff States. Stip. ¶¶ 5.6-5.25. The Tax can be, and in many instances already has been, passed through to consumers, thus imposing a "tax burden" on electricity. *Id.* Final Report, 19.

New Hampshire's argument to the contrary should be rejected. In the first place, New Hampshire's restrictive interpretation of Section 391 is at odds with the broad language of the statute, which prescribes taxes "on *or* with respect to" generation or transmission and which either "directly *or* indirectly" result in discrimination (emphasis added).[22] New Hampshire has pointed to

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[22] New Hampshire argues that the language "with respect to" should be construed narrowly, citing two lower federal court cases, both of which are inapposite. (N.H. Brief, 56-57). *Henshel v. Guilden*, 300 F. Supp. 470, 472 (S.D.N.Y. 1969), held that a declaratory action to determine which of two entities was liable for a federal tax assessment did not fall within the exception to the Declaratory Judgment Act for cases "with respect to Federal taxes," since the action did not seek a determination as to either the existence or the extent of federal tax liability, but only which of two entities was liable for the otherwise unchallenged assessments. *King v. United States*, 390 F.2d 894, 914 (Ct. Cl. 1968), *rev'd on other grounds*, 395 U.S. 1 (1969), similarly held that a declaratory action to determine the plaintiff's right to a disability retirement did not fall within the exception in the Declaratory Judgment Act for cases "with respect to" Federal taxes, since the action did not seek a determination as to the plaintiff's tax liability. Neither of the cases stands for the proposition that the phrase "with respect to" should be construed narrowly.

nothing in the legislative history of Section 391 to suggest that Congress intended that statute to be so narrowly construed, or to apply *only* to the New Mexico tax at issue in *Snead*.

Further, New Hampshire cites no authority for its proposition that a tax "on" generation must necessarily vary with the output or use of a power plant, and common sense requires the contrary conclusion. Thus, for example, a flat tax of $500 on "any person who generates electricity" clearly would be a tax "on" generation, but such tax would not vary with the level of electricity produced. In any event, the fact that the Seabrook Tax does not vary with output is irrelevant, since Section 391 broadly prohibits not only discriminatory taxes "on" generation or transmission but also discriminatory taxes "with respect to" generation or transmission, language that encompasses the New Hampshire tax irrespective of its form as a property tax.

Finally, New Hampshire's attempt to rely on language in *Snead* in support of its argument that Section 391 does not apply to property taxes is unavailing. New Hampshire cites the Court's statement that "[t]o look narrowly to the type of tax the federal statute names . . . is to be faithful not only to the language of the statute but also to the expressed intent of Congress in enacting it." (N.H. Brief, 59 (quoting *Snead*, 441 U.S. at 149-50)). But in the quoted statement, the Court was not addressing the issue of the scope of the language "on or with respect to the generation or transmission of electricity." Rather, the Court made the statement in the context of its discussion as to whether Section 391 was coextensive with the Commerce Clause. *See* 441 U.S. at 149-50. As

noted above, *see supra* note 20, the Court in *Snead* did not consider the scope of the language "on or with respect to the generation or transmission of electricity," and nothing in the Court's opinion supports New Hampshire's argument that Section 391 does not apply to property taxes.[23]

B. The Special Master Correctly Concluded That The Seabrook Tax And Credit Violate 15 U.S.C. § 391.

The Special Master concluded that the Seabrook Tax and credit, in combination, result in "a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce," in violation of Section 391. Final Report, 20. In reaching his conclusion, the

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[23] Neither of the two state cases that addressed the issue of the applicability of Section 391 aid New Hampshire's narrow construction of the statute. *Nevada v. Burbank*, 100 Nev. 598, 691 P.2d 845 (1984), held that a tax on the value of the right to receive electric power was encompassed within Section 391. The Court reasoned that although the tax in question "purports to tax only the value of the right to receive electricity, the difference is one without a distinction" since the tax "directly impacts on the transmission of electricity to [California cities], who in turn, must increase the cost of electrical power to their resident consumers." 100 Nev. at 603, 691 P.2d at 848.

Pacific Power & Light Co. v. Martana Dept. of Revenue, 237 Mont. 77, 773 P.2d 1176 (1989), *cert. denied*, 493 U.S. 1050 (1990), held that Montana's beneficial use tax on the use of federally owned tax-exempt transmission lines was not encompassed within Section 391 because it was not a tax "upon" generation or transmission of electrical power, but rather a tax on the use of facilities. 237 Mont. at 91-92, 773 P.2d at 1185. The Montana court was not, however, considering a tax on "Nuclear Station Property" defined by reference to property used solely for generation and transmission of electricity. The Montana court did not address the meaning of the phrase "or with respect to."

Special Master found that the Seabrook Tax scheme "replicates the flaw identified by this Court in the New Mexico Electrical Energy Tax scheme" at issue in *Snead*, insofar as the New Hampshire tax statute, like the New Mexico tax statute, allows a credit against a separate tax assessed on "inherently" in-state activity – the gross receipts tax on intrastate sales of electricity, in the case of New Mexico, and the Business Profits Tax, in the case of New Hampshire. Final Report, 20. Drawing on hypothetical examples as well as on facts in the stipulated record concerning the actual operation of the Seabrook Tax and credit, the Special Master demonstrated how the Tax and credit impose a greater burden on "manufacturers, producers, wholesalers, [and] retailers" of electricity generated and transmitted interstate commerce, and against their customers as "consumers," in violation of Section 391. Final Report, 24.

The Special Master correctly concluded that the Seabrook Tax and credit violate Section 391.[24] The "critically material feature" of the Tax and credit combination is that "the more of a utility's total net income is allocated to New Hampshire, the greater that utility's ability to shelter total income from taxation (up to the amount of Seabrook Tax paid)." Final Report, 22. Consequently, the New Hampshire tax statute "ensures that [a utility that allocates all of its income to New Hampshire] will pay only one tax, the Seabrook Tax, up to the point where its Business Profits Tax liability exceeds the amount of the Seabrook Tax." Final Report, 22.

The Seabrook Tax scheme suffers from the same discriminatory defect as the New Mexico electrical energy

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[24] The Special Master rejected the alternative argument asserted by the Intervenors (but not raised by the plaintiff States) that the Seabrook Tax, standing alone without the credit, discriminates in violation of Section 391. Final Report, 19 n. 11.

tax at issue in *Snead*:[25] "allowance of a credit for a local tax paid against a separate local tax owed, with a resultant discrimination against interstate commerce. Payers of the New Mexico Electrical Energy Tax were allowed a credit against a tax inherently assessed only on in-state activity – the gross receipts tax on intrastate sales of electricity. Payers of the Seabrook Tax likewise are allowed a credit against a tax inherently assessed only on in-state activity – the Business Profits Tax, assessed on income allocable to New Hampshire by virtue of a formula based on sales, payroll and property ownership in-state." Final Report, 20-21 (footnotes omitted).

The Court in *Snead* held that the Electrical Energy Tax violated Section 391, because the effect of the tax was to discriminate against sales of electricity made outside New Mexico. The discriminatory effect of the tax resulted from the fact that

> a generating company's 2% tax is completely offset by the credit against the 4% retail sales tax when its electricity is sold within New Mexico. But to the extent that the electricity generated in New Mexico is not sold at retail in the State, there is no gross receipts tax liability against which to offset the electrical energy tax liability of the generating company.

441 U.S. at 145.

The Court found that the New Mexico tax "is concededly a tax on the generation of electricity." 441 U.S. at 149. Furthermore,

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[25] The New Mexico Electrical Energy Tax imposed a 2% energy tax "on any person generating electricity" within the state. 441 U.S. at 143 n. 4. The tax applied to electricity generated in New Mexico and sold either within or outside the state. *Id.* The Act further provided that the Electrical Energy Tax could be credited against a company's tax liability under the state's general gross receipts tax (a 4% tax that applied to retail sales of electricity within New Mexico) when the electricity was generated and consumed within New Mexico.

> [t]he tax-credit provisions of the Act itself insure that locally consumed electricity is subject to *no* tax burden from the electrical energy tax, while the bulk of the electricity generated in New Mexico by the appellants is subject to a 2% tax, since it is sold outside the State. To look narrowly to the type of tax the federal statute names, rather than to consider the entire tax structure of the State, is to be faithful not only to the language of that statute but also to the expressed intent of Congress in enacting it. Because the electrical energy tax *itself* indirectly but necessarily discriminates against electricity sold outside New Mexico, it violates the federal statute.

441 U.S. at 149-50 (emphasis in original) (footnote omitted).[26]

Because sales are one component of the three-part allocation formula upon which New Hampshire's Business Profits Tax is based (and likewise are one component of the similar allocation formulas used to measure taxable income in each of the plaintiff States, see Conn. Gen. Stat.

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[26] Because the Court in *Snead* concluded that the New Mexico statute was invalid under Section 391, it did not reach the plaintiff's claim under the Commerce Clause and other constitutional claims. 441 U.S. at 146. The remarks of several Senators during the floor debate suggest an independent reason for enacting Section 391 even if the federal statute was, as New Mexico had argued, no more than an affirmative statement of the protection afforded by the Commerce Clause; Senators Fannin, Goldwater, and Cranston indicated their hope that enactment of the federal statutory prohibition would resolve the issue of discrimination on interstate electricity sooner than the constitutional issues could be resolved in the then-pending state court challenge to the New Mexico tax. *See* 122 Cong. Rec. 24327-29 (July 28, 1976). *See*, e.g., statement of Senator Cranston that consumers outside New Mexico "should not have to wait for years of litigation for relief." 122 Cong. Rec. 24327.

§§ 12-213, *et seq.*; Mass. Gen. L. ch. 63, § 52A; R.I. Gen. Laws §§ 41-13-1, *et seq.*; Stip. ¶ 2.4), sales of electricity in New Hampshire necessarily enable an owner to derive greater benefit from the credit provision than would sales outside the state. The New Hampshire credit provision thus "*itself* indirectly but necessarily discriminates against electricity sold outside [New Hampshire]," 441 U.S. at 150, and so violates Section 391.

The discriminatory effect of the credit provision is illustrated by the hypothetical scenario set forth in the Final Report, as well as by the actual operation of the Tax as shown by facts drawn from the stipulated record, and cited by the Special Master. *See* Final Report, 22-24, 29-33, and Appendix C. As the Special Master concluded, the less a joint owner's income is allocable to New Hampshire, the less benefit that owner is able to derive from the credit. This "greater relative 'burdening' " of certain owners, solely because they conduct less business activity in New Hampshire, "results 'indirectly from the Seabrook Tax and credit scheme, in contravention of 15 U.S.C. § 391.' " Final Report, 24.

New Hampshire takes exception to the Special Master's conclusion that the Seabrook Tax and credit violate Section 391, arguing that his conclusion is foreclosed by his finding that "customers in New Hampshire have borne as much of the burden of the Seabrook Tax as those in the Plaintiff States." (N.H. Brief, 59 (quoting Final Report, 16)). Apparently misunderstanding the import of the foregoing finding, New Hampshire then goes on to assert that "[t]he evidence established and the Special Master agreed that there is no greater tax burden on electricity transmitted to utilities and customers in the Plaintiff States than on electricity transmitted to utilities and their New Hampshire customers." (N.H. Brief, 59).

Once again, New Hampshire misses the point. The Special Master found that the property tax provision of the Seabrook Tax scheme standing alone "even handedly affects interstate and intrastate commerce," insofar as it is "assessed on all owners of Seabrook in direct proportion

to their ownership interests, regardless of final destination of Seabrook electricity." Final Report, 20. However, he went on to conclude that the tax in combination with the credit provision results in discrimination by ensuring that the more of a utility's total net income is allocated to New Hampshire, "the greater that utility's ability to shelter total income from taxation (up to the amount of Seabrook Tax paid)." *Id.* at 22. Contrary to New Hampshire's assertion, the Special Master expressly determined that the tax and credit result in a greater burden on electricity transmitted in interstate commerce: "[t]his greater relative 'burdening' " of owners who engage in less business activity in New Hampshire "results directly from the Seabrook Tax and credit scheme, in contravention of 15 U.S.C. § 391." Final Report, 24.

New Hampshire also challenges the Special Master's conclusion by attempting to distinguish *Snead*, arguing that the tax credit provided by the New Mexico statute was unavailable to "out-of-state interests." (N.H. Brief, 61). New Hampshire goes on to quote the Court's statement in *Snead* that the New Mexico tax statute allowed a credit only for electricity generated and consumed in New Mexico, thereby ensuring that " 'locally consumed electricity is subject to no tax burden . . . while [interstate electricity] . . . is subject to a 2% tax, since it is sold outside the State.' " (N.H. Brief, 61 (quoting *Snead*, 441 U.S. at 149)). But far from providing a basis upon which to distinguish *Snead*, the quoted statement only serves to highlight that the New Hampshire tax statute "replicates the flaw," *see* Final Report, 20, of the New Mexico tax statute, by ensuring that an owner of Seabrook necessarily derives a greater benefit from the credit provision for electricity generated and consumed in New Hampshire than for electricity generated and consumed outside the state.

The fact that the text of the New Mexico statute specified that the credit was available only for electricity consumed within the state does not distinguish the New Mexico tax from the tax at issue here; as the Special

Master explained, the same discrimination would have resulted in the absence of such language, since the gross receipts tax against which the credit was available itself applied only to receipts from electricity sold within New Mexico. Final Report, 20-21 n. 12. The New Hampshire tax statute, by allowing a credit against a tax assessed only on local activity – the Business Profits Tax – likewise ensures that the credit is available only as an owner shifts taxable business activity (and therefore income) to New Hampshire. The greater burden on interstate electricity that results from the credit provision violates Section 391.[27]

III. THE REFUNDING OF ALL SEABROOK TAX PAID LESS THE CREDITS TAKEN AGAINST THE BUSINESS PROFITS TAX IS THE PROPER REMEDY (RECOMMENDATION D)

The Special Master recommended that the Court apply its decision in this case retrospectively, and "order New Hampshire to refund all Seabrook Tax collected by it, reduced by the amounts of Business Profits Tax due as a result of the elimination of the Seabrook Tax credit." Final Report, 39. At the outset of this case, New Hampshire conceded that the same remedy would be appropriate. (N.H. Brief in Opp., 26). For the reasons that follow,

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[27] New Hampshire further seeks to distinguish *Snead* on the basis that the tax credit available under the New Mexico statute "was certain to provide a dollar for dollar benefit to the favored local interests in every case" because both the generating tax and the gross receipts tax in effect were measured by gross receipts. (N.H. Brief, 61). The effect of the New Hampshire Tax statute instead varies depending on the extent of income allocable to New Hampshire, the profitability of a Seabrook owner in any given year, and the owner's percentage share of Seabrook. Final Report, 21. As the Special Master correctly concluded, that fact only affects the *extent* of discrimination, not its existence. *Id.*

the plaintiff States urge this Court to adopt Recommendation D.

A. There Is No Basis For Limiting Relief To A Prospective Application.

The retroactive application of the finding of unconstitutionality is appropriate in this case, given the clear and unique language of the New Hampshire statute and established doctrine regarding retrospective relief. Thus, the plaintiff States urge this Court to adopt the recommendation of the Special Master on this point.

New Hampshire contends that refunds would be an inappropriate remedy under *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Although the continued vitality of this case has been called into question following *James B. Beam Distilling Co. v. Georgia*, ___ U.S. ___, 111 S.Ct. 2439 (1991), as well as in the pending case of *Harper v. Virginia Dept. of Taxation*, Supreme Court Docket No. 91-794, *Chevron* provides no basis for New Hampshire's claim that retroactive relief is inappropriate. Under *Chevron*, the Court considered three factors in determining whether a retroactive remedy is appropriate:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, . . . we must- . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Finally, we [must] weig[h] the inequity imposed by retroactive application, for where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for

avoiding the injustice or hardship by a holding of nonretroactivity.

Chevron, 404 U.S. at 106-07 (citations omitted).

The first of the three is most critical and is a threshold that must be met. If the determination of invalidity is to be given merely prospective application, as New Hampshire urges, then it is incumbent upon New Hampshire to prove that a new principle of law has been established – and this it cannot do. As discussed above, the invalidity of the Seabrook Tax is the result of the application of principles easily derived from a series of cases of this Court in which state taxes have been struck down as favoring in-state interests. *Boston Stock Exch. v. State Tax Com'n.*, 429 U.S. 318; *Westinghouse Electric Corp. v. Tully*, 466 U. S. 388; *Armco, Inc. v. Hardesty*, 467 U.S. 638; *Tyler Pipe Industries v. Washington Dept. of Revenue*, 483 U.S. 232; *American Trucking Association, Inc. v. Scheiner*, 483 U.S. 266. Therefore, this case is similar to *Ashland Oil Inc v. Caryl*, ___ U.S. ___, 110 S.Ct. 3202, 3205 (1990), in which the Court held that *Armco*, although "unquestionably contribut[ing] to the development of our dormant Commerce Clause jurisprudence," was to be given retroactive effect.

> *Armco* neither overturned established precedent nor decided "an issue of first impression whose resolution was not clearly foreshadowed." *Chevron Oil, supra*, 404 U.S., at 106, 92 S.Ct., at 355. To be sure, *Armco* paved the way for *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U.S. 232, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987), which arguably "overturn[ed] a lengthy list of settled decisions" and "revolutionize[d] the law of state taxation," *id.*, at 257, 107 S.Ct., at 2825 (Scalia, J., concurring in part and dissenting in part), by extending the internal consistency test. *Armco* itself, however, was not revolutionary.

Id.

In light of the clear precedents supporting the plaintiffs in this case, any claim by New Hampshire that a finding of unconstitutionality as to its Seabrook Tax "was not clearly foreshadowed" is truly specious. Since New Hampshire has failed to meet the threshold test of the first prong of *Chevron*, there is no basis to deny refunds in this case.

B. There Is No Basis Under The *McKesson* Decision To Refrain From Ordering Refunds.

In *McKesson v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), the Court held that a Florida liquor excise tax favored local over out-of-state products and thus violated the Commerce Clause. The Court declined to order refunds, but instead remanded the case to the state court for further proceedings to address the appropriate remedy for the unlawful discrimination, *e.g.*, refunds to injured taxpayers or retrospective imposition of taxes upon those who had benefitted from the discrimination.

A comparable resolution here is not appropriate under the unique circumstances of this case. First, the Legislature of New Hampshire has already stated in its legislation that the imposition of the Seabrook Tax is to be inextricably bound to the allowance of the credit to offset liability under its Business Profits Tax. The remedy of refunds is mandated by the clear language of the nonseverability clause of the New Hampshire statute itself:

> Nonseverability. It is the intent of the legislature that sections 1 [enacting the Tax on Nuclear Station Property] and 2 [enacting the credit for the Business Profits Tax] of this act be considered a unit and their provisions inseparable. If any provision of sections 1 and 2 of this act is

> declared unconstitutional, then sections 1 and 2 and all of their provisions shall be invalid.

1991 New Hampshire laws, Ch. 354:19.[28]

This statutory declaration stands in stark contrast to the provision immediately subsequent to the non-severability clause, which makes severable all other provisions of the Act *except for* the Seabrook property tax and credit provisions. Ch. 354:20.

The New Hampshire Legislature has thus stated that if the credit provision (section 2) is invalid, then the tax (section 1), by the terms in the very legislative act that creates it, must be held invalid. New Hampshire, having contemplated the possibility of its tax or credit provision being held invalid, has already spoken, making remand unnecessary and inappropriate.

Second, New Hampshire has already spoken on the issue of refunds in another way. In its Brief in Opposition to Motion for Leave to File Complaint, at 26, filed with the Court in this case, New Hampshire opposed a preliminary injunction, stating:

> In fact, any taxes found to have been wrongly collected would be refundable, with interest, under New Hampshire law (App. 75A; R.S.A. 83-D:10), and the ratepayers, it is expected, could be reimbursed in rates for any overcollections.[29]

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[28] New Hampshire's attempt to rewrite the nonseverability clause by claiming that it should only be applied prospectively (N.H. Brief, 69) is contrary to the plain language of the statute and to any common sense interpretation of this and any non-severability clause.

[29] It is noted that R.S.A. 83-D:10 was repealed as of May 19, 1992, and subsequent to the initiation of the action. Such legislation should have no effect on the present case, based upon R.S.A. 21:37: "Effect of Repeal. The repeal of an act shall in no case affect any act done, or any right accruing, accrued, acquired or established, or any suit or proceeding had or commenced in any civil case, before the time when repeal shall take effect."

Lastly, the Special Master correctly states that since this case is an original jurisdiction action, there is no other tribunal to which remand is possible. Final Report, 43. This Court, acting as both trial court and court of last resort, should itself provide complete and final relief.

In summary, in the specific circumstances of this case, the refund recommended by the Special Master is the proper remedy.

C. The Eleventh Amendment Is Not A Bar To The Ordering of Refunds.

Contrary to New Hampshire's claim (N.H. Brief, 69), the Eleventh Amendment is not a bar to the refunding of taxes collected, under the specific and unique facts in this proceeding.

The Eleventh Amendment does not bar original actions, including actions for refunds, *Maryland v. Louisiana*, 451 U.S. at 745 n. 21. This Court stated "an original action between two States only violates the Eleventh Amendment if the plaintiff State is actually seeking to recover for injuries *to specific individuals*." *Id.* (emphasis added).

The plaintiff States did not bring this action on behalf of "specific individuals." Rather, the plaintiff States invoked this Court's jurisdiction solely to protect themselves as consumers of electricity and, as *parens patriae*, millions of their citizens, from the harm of electric rates increased by taxes improperly imposed by New Hampshire upon the sellers of the electricity. Contrary to New Hampshire's suggestion (N.H. Brief, 70-71), the ratepayers will be fully entitled to a refund in their names if the utilities receive a refund on their taxes. *See, e.g.*, Mass. Gen. L. ch. 164, § 94G.

Neither the existence of the utility-owners of the Seabrook plant as intermediaries or nominal taxpayers of

the Seabrook Tax, nor their participation here as intervenors changes the nature or purpose of this proceeding in any way. *Arizona v. California*, 460 U.S. at 613-14; *Maryland v. Louisiana*, 452 U.S. 456, 457 (1981). The ordering of a refund of an invalid tax is within the Court's authority pursuant to its jurisdiction to hear cases between States, pursuant to Article III, Section 2 of the Constitution, and is not prohibited by the Eleventh Amendment.

IV. THE COURT SHOULD RETAIN JURISDICTION OF THE CASE (RECOMMENDATION A)

The Special Master concluded that the case "remains appropriate for the exercise of the Court's original jurisdiction." Final Report, 15. New Hampshire's exception to this recommendation is premised on the same mischaracterization of both the Seabrook Tax and credit scheme and the plaintiff States' challenge to it that has permeated its Brief in Support of Exceptions to the Special Master's Report. (N.H. Brief, 74-78). The Court should reject this argument and retain jurisdiction of the case.

This Court has recently noted that, while it surely has the power in original jurisdiction cases to reassess and ultimately reverse its grant of jurisdiction following receipt of the Special Master's Report, it will not do so unless it is "convinced" that it was "clearly wrong in accepting jurisdiction" in the first place. *Wyoming v. Oklahoma*, ___ U.S. ___, 112 S.Ct. at 796. At the least, New Hampshire bears the burden to show a "change of circumstances, whether of fact or law[,]" that would justify dismissal of the complaint at this late stage. *Id.* New Hampshire has not made, and cannot make, such a showing.

A. The Plaintiff States Have Standing To Maintain An Original Action Against The Seabrook Tax.

When the plaintiff States sought to invoke the Court's original jurisdiction, they premised their standing on two separate injuries: injury to themselves in their

proprietary capacities, and injury to substantial portions of their general populations, whom they represent in their *parens patriae* capacities. (Plaintiffs' Brief in Support of Motion to File, 15-19). This Court granted the States' motion on this basis, despite New Hampshire's objections that, *inter alia*, the plaintiff States lacked standing to bring the action because they did not directly pay the tax and had suffered no harm from the payment of the tax by the utilities. (N.H. Brief in Opp., 7-9).

Subsequent events have only reaffirmed the appropriateness of the Court's exercise of jurisdiction. The stipulated facts show that the plaintiff States are indeed "substantial consumers" of electricity whose costs have increased as a result of the Seabrook Tax, Stip. ¶¶ 5.2-5.8; 5.11-5.13; 5.15-5.20; 5.23; 5.32-5.36, and that millions of consumers in the plaintiff States have already paid and continue to pay the Seabrook Tax in their rates. Stip. ¶¶ 5.2-5.13; 5.15-5.20; 5.23-5.24. *See Maryland v. Louisiana*, 451 U.S. at 739. These consumers will bear approximately $10-15 million in annual additional costs as a result of the unconstitutional tax-and-credit scheme, Stip. ¶¶ 4.1-4.5, 5.1-5.31, and these annual costs will recur for the expected thirty-five year life of the Seabrook Station. Stip. ¶ 3.2.

As the Special Master concluded, the plaintiff States' alleged injury "fairly can be traced to the challenged action of the defendant[.] That asserted wrong in turn would furnish[] ground for judicial redress[.]" Final Report, 16 (internal quotation marks and citations omitted).

Because the plaintiff States have established such an injury, they have standing to bring this action and the Court should retain jurisdiction over this case. *Maryland v. Louisiana*, 451 U.S. at 735-45; *Wyoming v. Oklahoma*, 112 S.Ct. at 798-800.

B. No Changed Circumstances Support Dismissal Of The Complaint At This Late Stage Of The Case.

In seeking to reverse the grant of original jurisdiction, New Hampshire argued to the Special Master, and argues again to this Court, that "changed circumstances" have now rendered this case inappropriate for original jurisdiction. Specifically, New Hampshire argues that "[p]laintiffs, the States of Connecticut, Massachusetts and Rhode Island are not Nuclear Property Tax payers and their citizens as consumers are not bearing a higher New Hampshire tax burden than consumers in New Hampshire." (N.H. Brief, 74).

The Special Master rejected this argument, concluding that the case remained appropriate for the Court's exercise of original jurisdiction. Final Report, 16-17. The plaintiff States urge the Court to reject New Hampshire's argument and adopt the Special Master's Recommendation A because (1) the Court has already rejected the same argument made by New Hampshire in opposing plaintiffs' Motion for Leave to File the Complaint, (2) the argument is "an argument on the merits rather than an assertion of a jurisdictional flaw," Final Report, 16, and (3) New Hampshire's argument mischaracterizes the claim of the plaintiff States and the findings of the Special Master.

First, New Hampshire's sole exception to original jurisdiction was also made in its opposition to the plaintiff States' motion for leave to file their complaint. In that opposition, New Hampshire specifically addressed the relative rates for electricity paid by New Hampshire and other States' consumers, stating that New Hampshire consumers would pay the Seabrook Tax in their rates, and that New Hampshire utilities would be unable to benefit from the credit while some "out-of-state" utilities would likely employ at least some of the credit. (N.H. Brief in Opp., 23-24). The plaintiff States did not contest these facts in 1991, nor do they contest them now, but neither

fact undermines the original jurisdiction of the Court, and neither fact constitutes a "changed circumstance" that supports dismissal of the case at this late stage.

Second, the Special Master correctly described New Hampshire's argument as "an argument on the merits rather than an assertion of a jurisdictional flaw." Final Report, 16. Indeed, when New Hampshire made the same point in its Brief in Opposition to Motion for Leave to File Complaint (22-24), it included the point in a section on the merits. The argument addresses the merits of plaintiffs' claim of a discriminatory tax, not their jurisdictional claim of a "controversy between two or more States" under Article III, Section 2, and 28 U.S.C. § 1251(a). The Special Master therefore correctly concluded that payments by New Hampshire consumers in 1991 and 1992 did not affect the standing of the plaintiff States or the existence of a case or controversy. The Special Master found that "the Plaintiff States and Intervening Utilities assert sufficient injury" to create standing and "furnish ground for judicial redress." Final Report, 16 (citations omitted).

Third, the Court should reject New Hampshire's alleged "changed circumstances" because its argument mischaracterizes plaintiffs' claim and the findings of the Special Master. New Hampshire relies on stipulated facts showing that New Hampshire consumers have paid the Seabrook Tax in their rates, and that New Hampshire utilities have been unable to utilize the credit thus far due to lack of profitability or exemption. (N.H. Brief, 75). New Hampshire then argues that these facts demonstrate that out-of-state consumers have not been burdened by the Seabrook Tax and cites the Special Master's finding that "customers in New Hampshire have borne as much of the burden of the Seabrook Tax as those in the Plaintiff States." Final Report, 16.

New Hampshire's argument in this regard ignores the crux of the plaintiff States' claim of discrimination and the conclusions of the Special Master. Contrary to New Hampshire's arguments, the Special Master did *not*

find (1) that the relative burden of the Seabrook Tax on in and out-of-state consumers will remain the same for the life of the tax, or (2) that consumers in the plaintiff States have not borne a greater *total* burden, when taxes in all States are considered. Rather, he concluded that the ultimate and inevitable effect of the Seabrook Tax and credit scheme will be to reduce the total burden on ratepayers in New Hampshire who are likely to buy electricity from a company that conducts substantial business in New Hampshire, and that the Seabrook Tax credit " 'backstopped' any intrastate utility, *guaranteeing* that, no matter what its profit picture or tax status, its intrastate customers would pay only one tax up to the point of the full Seabrook Tax paid." *Id.* (emphasis in original). New Hampshire has ignored the latter finding, and mistakenly suggests that the Master found that the relative burdens of the Seabrook Tax on consumers in all States will always be the same, and that there is no current discrimination against non-New Hampshire consumers. The Master correctly rejected both of these arguments, and determined that, in any event, they do not affect the Court's original jurisdiction.

C. The Special Master Correctly Concluded That All Other Relevant Factors Support Original Jurisdiction.

As discussed above, the Special Master correctly rejected New Hampshire's claim that "changed circumstances" have rendered this case inappropriate for original jurisdiction. Indeed, the Special Master added that "this case is, if possible, even more appropriate for the Court's exercise of original jurisdiction than when first accepted." Final Report, 17. In reaching this conclusion, the Special Master correctly applied the factors that

inform the Court's discretionary judgment to exercise its original jurisdiction:[30]

> No other suit to date has been filed that raises the issues herein presented, nor is there a readily identifiable alternative forum in which all of the parties could assert their claims. This case, involving a tax on New Hampshire's only nuclear power plant that affects four other New England States, is one of the utmost seriousness and dignity. Considerations of judicial economy, in addition, now weigh in the balance. The parties have expended considerable energy and resources to stipulate the facts and fully brief and argue the issues before me. The matter is ripe for decision.

Final Report, 17.

Significantly, New Hampshire has not challenged the exercise of jurisdiction on any of these grounds.

In summary, no changed circumstances support the dismissal of this case at this late stage. The Special Master correctly recommended that "this Court retain jurisdiction of this most pressing and serious matter," *id.*, and the plaintiff States urge this Court to adopt that recommendation.

CONCLUSION

For all the foregoing reasons, the Court should adopt Recommendations A through D of the Special Master, retain its original jurisdiction, and enter judgment for the

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[30] *See Mississippi v. Louisiana*, ___ U.S. ___, 113 S.Ct. 549, 552-53 (1992); *Texas v. New Mexico*, 462 U.S. 554, 570 (1983) (citations omitted); *Wyoming v. Oklahoma*, 112 S.Ct. at 798 (referring to "prudential" and "equitable" standards). *But see California v. West Virginia*, 454 U.S. 1027, 1028 (1981) (Stevens, J., dissenting from order denying motion for leave to file complaint); *Wyoming v. Oklahoma*, 112 S.Ct. at 811 n. 1 (Thomas, J., dissenting).

plaintiff States in accordance with the recommendations of the Special Master.

Respectfully submitted,

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FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF CONNECTICUT,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,

Plaintiffs,

v.

STATE OF NEW HAMPSHIRE

Defendant.

ON THE REPORT OF THE SPECIAL MASTER
OF DECEMBER 30, 1992

REPLY BRIEF FOR THE STATE OF NEW HAMPSHIRE

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STATE OF CONNECTICUT,
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Plaintiffs,

v.

STATE OF NEW HAMPSHIRE,

Defendant.

ON THE REPORT OF THE SPECIAL MASTER
OF DECEMBER 30, 1992

REPLY BRIEF FOR THE STATE OF NEW HAMPSHIRE

QUESTION PRESENTED

Whether the record established that the New Hampshire Tax on Nuclear Station Property statue, by itself, is invalid under the Commerce Clause of the United States Constitution or under 15 U.S.C. § 391.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article 1, section 8, clause 3 of the Constitution of the United States provides as follows:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes.

Article VI, clause 2 of the Constitution of the United States provides as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

Title 15 U.S.C. § 391 provides as follows:

> **Tax on or with respect to generation or transmission of electricity.** No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

STATEMENT OF THE CASE

Plaintiffs, the Commonwealth of Massachusetts and the States of Rhode Island and Connecticut, argued before the Special Master that New Hampshire's Nuclear Station Property Tax statute violated the Commerce Clause and 15 U.S.C. § 391 because it allowed Seabrook owners to claim a credit against their New Hampshire business profits tax obligation. As Plaintiffs stated in their brief to the Special Master: ". . . the discrimination in this case arises from the interplay of the *ad valorem* tax with the credit against the Business Profits Tax." Plaintiffs' Reply Brief at 14. Intervenors' principal argument was also that the combination of the tax and the credit violated the constitution and Section 391. They stressed to the Special Master that "our facial challenge is to the tax *and* the credit." Reply Brief For Intervenors at 5.

Intervenors raised an additional, "fallback," argument before the Special Master that New Hampshire's Nuclear Station Property Tax, by itself, discriminated against interstate commerce. The Special Master's Final Report notes that Plaintiffs did not advance this argument. Final Report at 13. Intervenors themselves gave it little emphasis. Indeed, their counsel conceded at oral argument, when asked by the Special Master for "the best case" supporting the fallback theory, that "I don't think there is a case in point." Transcript of Argument, 12/8/92 at 34.

Nonetheless, the Special Master considered Intervenors' fallback argument and rejected it, concluding that "the Seabrook Tax standing alone (without the credit) [is not] violative of the Commerce Clause." Final Report at 26 n.17. The Special Master reached the same conclusion under Section 391, recommending rejection of Intervenors' "alternative contention that the Seabrook tax alone, without the credit" violates 15 U.S.C. § 391. Final Report at 19 n.11.

In recommending rejection of Intervenors' unprecedented challenge to an *ad valorem* property tax, the Special Master followed the long line of decisions discussed in Section A, pages 13-22, of New Hampshire's Brief In Support Of Exceptions. Those authorities establish that New Hampshire is entitled to impose property taxes and to determine classifications of property subject to taxation. As Intervenors have acknowledged, no case has ever held that a property tax, standing alone, discriminates against interstate commerce. Despite all these factors, Intervenors have filed an exception to the portions of the Special Master's Final Report dealing with the fallback argument and this brief responds to that exception.

SUMMARY OF ARGUMENT

The Special Master concluded that there was a difference between nuclear and non-nuclear generating plants and that New Hampshire could impose a property tax on one and not the other. The record supports this conclusion because it reflects that New Hampshire is responsible for the health and welfare of its citizens; that the Seabrook communities lack resources to deal with emergencies at the plant and that the resources of State government could therefore be called upon, just as they were in Pennsylvania and New Jersey when the Three Mile Island accident occurred. The record also indicates that the property tax revenue is deposited where it belongs — in the State's General Fund — which is used to finance police, fire and general welfare expenditures of the type that Seabrook might require. The evidence demonstrates that special funds, such as the decommissioning fund, mentioned by Intervenors are likely to be inadequate if early decommissioning is necessary or if other events make the estimates on which deposits into the fund were based incorrect.

Even more evidence that nuclear plants impose special risks and burdens would have been introduced in this case but it was

not necessary to do so. It was not necessary because Plaintiffs and Intervenors stipulated that the Nuclear Property Tax was fairly related to the State's services. In reliance on that stipulation, New Hampshire agreed to streamline the factual presentation in order to meet the Special Master's goal of expediting submission of the case.

Intervenors' argument that, despite the differences between nuclear and non-nuclear property, New Hampshire lacked the power to impose a tax on nuclear property is based on assertions that are not supported by the record. Intervenors assert that Seabrook is predominately engaged in interstate commerce and is owned primarily by out-of-state businesses. The record establishes that Seabrook is engaged in substantial intrastate commerce and that a large percentage of Seabrook's output goes to New Hampshire. Moreover, approximately 50% of the plant is owned by New Hampshire corporations, each of which pays the tax.

Although Intervenors' argument is primarily based on factual assertions, they also seek to distinguish the decisions on which the Special Master relied. Their distinctions are unavailing. *Nordlinger v. Hahn*, 112 S. Ct. 2326 (1992), strongly supports the Final Report's recommendation that New Hampshire's classification be upheld. The differences between nuclear and non-nuclear property that support the statute's classification under the Equal Protection Clause would support it under the Commerce Clause as well.

Intervenors acknowledge that *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), holds that a State tax may fall "predominately on interstate commerce" without violating the Commerce Clause and that a property tax could be imposed on electrical generating plants, even if the electricity produced "largely traveled out of state." Intervenors' Brief at 15. The distinction Intervenors seek to make between a property tax

on electrical generating plants and a property tax on nuclear plants is unsupported by anything in the *Montana* decision.

Nothing in *Complete Auto Transit Inc v. Brady*, 430 U.S. 274 (1977), supports Intervenors' fallback claim. The footnote from *Complete Auto* on which Intervenors rely emphasizes the importance of applying the four factor analysis adopted by the Court therein rather than deciding Commerce Clause cases based on labels. Here, the parties agree that three of the factors are satisfied and any view of the economic realities and practical effects, as are stressed by the *Complete Auto* Court, leads to the conclusion that the Nuclear Property Tax itself does not discriminate.

Intervenors' references to isolated comments by an individual New Hampshire representative are irrelevant to the issue presented here. The validity of the Nuclear Property Tax turns on the tax itself, not on what someone says about it. Equally unavailing is Intervenors' argument that 15 U.S.C. § 391 assists them. Section 391 does not focus on whether taxpayers are out-of-state businesses; it focuses only on whether whatever portion of electricity goes into interstate commerce bears a greater Nuclear Property Tax burden than electricity consumed in New Hampshire. Because the same tax rate is applied to all sales, whether in interstate or intrastate commerce, there is no greater burden on interstate sales.

Finally, New Hampshire advises the Court that on March 26, 1993, a bill was introduced in the New Hampshire legislature exercising New Hampshire's rights under *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), to effect a cure of the defects identified by the Special Master in his Final Report. When adopted, the statute will resolve the problems raised by the Special Master in the Final Report and will eliminate the basis for the recommendation that the statute be invalidated.

ARGUMENT

A. The Special Master's Conclusion That There Is A Difference Between Nuclear And Non-Nuclear Plants Was Supported By the Record

The Special Master concluded that:

> It would be hard to say that New Hampshire did not have a reasonable basis for establishing different tax schemes for a nuclear plant, indeed the largest nuclear plant in New England, and fossil fuel and hydro plants.

Final Report at 27 n.17. Intervenors take exception to this conclusion, but make no mention of the substantial evidence in the record supporting it. The record provides ample basis for the Special Master's finding and provides no basis for rejecting it.

In assessing the record, it is noteworthy that, at the urging of the Special Master and in reliance on a waiver of certain arguments previously raised by Plaintiffs and Intervenors, New Hampshire agreed to limit the evidence it would introduce in this case. The result was that lengthy evidentiary proceedings concerning the reasons for imposing a tax on Nuclear Station Property, rather than on other types of property such as fossil fuel and hydro plants, were avoided. Thus, at the Fourth Meeting of Counsel, New Hampshire's counsel stated that:

> [I]n preparing the record, New Hampshire agreed to streamline some of the statements of fact, and it did so in part in reliance on statements that were made in the pretrial memorandum about the issues that would be involved in the case, and particularly, our understanding that the plaintiffs were not going to be making a contention independently that this tax fails to satisfy test four under *Complete Auto* [—] the test of fair relation to state services . . . . And in our discussion about the stipulation, we talked about including such a state-

> ment in the stipulation, and the conclusion was that this is a factual document, so we should not include it here, but [Intervenors' counsel] did offer to make a representation to the court on the record to that respect, and so I would ask that we have that representation.

Transcript, 9/9/92 at 31. Intervenors' Counsel agreed that this understanding had been reached and confirmed that neither Intervenors nor Plaintiffs intended to argue "that the services provided by the State of New Hampshire do not bear a fair relation to the tax imposed." Transcript at 32. Intervenors noted that they were considering advancing an argument that there had been a "singling out of this particular facility for a particular tax," but did not "regard those as qualifications" of the representation that no fairly related to state services argument would be made. *Id.*

Based on this record, the Special Master entered Litigation Management Order No. 4, memorializing Intervenors' and Plaintiffs' representation that they would not contend that the tax "is unrelated to services provided by the State." Order at 3. The Final Report similarly observes that Plaintiffs have "waived" their claim that the Nuclear Station Property Tax is "unrelated to services provided by New Hampshire." Final Report at 13.

Because New Hampshire streamlined its factual presentation when Plaintiffs dropped their fair relation to state services argument, detailed information about the special risks and burdens posed by Seabrook was not included in the record. But detailed factual information is not needed because the parties stipulated to the conclusion that such facts would be offered to support.

The parties did stipulate to facts emphasizing the special risks presented by Seabrook and the costs that may be incurred by New Hampshire. For example, it was stipulated that

"New Hampshire state government . . . ultimately bears responsibility for assuring the safety and health of New Hampshire residents" (Stipulation ¶ 13.1); that "local authorities in communities in the Seabrook vicinity currently have insufficient resources themselves to provide all of the emergency services that might be required" in the event of a nuclear accident at Seabrook (Stipulation ¶ 13.9); that the resources of New Hampshire State government may be necessary to address such emergency situations, *id.*, and that, when the accident at Three Mile Island occurred, the cost of the clean-up alone was $973 million and Pennsylvania and New Jersey state governments had to fund a portion of the cost. Stipulation ¶ 13.8.

Intervenors suggest that the fact that revenue from the Nuclear Station Property Tax is credited to New Hampshire's General Fund means that the funds are unavailable to finance the costs of dealing with Seabrook. But that is not the case. The General Fund "finances a wide variety of State services." Stipulation ¶ 11.4. Those services include "police and fire protection" as well as "general welfare programs" and "general services." *Id.* For example, if emergency services are needed in the communities surrounding Seabrook, General Fund revenue could finance those services. If New Hampshire were required to deal with demonstrations by concerned citizens at the Seabrook site, General Fund revenue could pay the costs. *See* Stipulation ¶ 13.4. Because the General Fund finances general welfare programs and general services, it could also be used to finance the costs of economic development and welfare programs in the event that the State's tourist industry suffers from the presence of a nuclear reactor on the New Hampshire's coastline. The General Fund is precisely where the Nuclear Property Tax revenue should be deposited to meet the special burdens and risks posed by Seabrook.

Intervenors also argue that General Fund revenue will not be necessary to deal with any problems caused by Seabrook because "[t]he State addresses concerns specific to Seabrook

through other, additional measures . . . ." Intervenors' Exceptions at 2. One of those concerns is the need to "decommission" Seabrook when it ceases to operate. Intervenors point to the existence of the separate nuclear decommissioning fund and assert that "the record belies any attempt to suggest that the tax is meant to compensate for the unusual burdens occasioned by nuclear power." Intervenors' Brief at 7. But the record demonstrates just the opposite.

The parties stipulated that "the costs of decommissioning . . . could exceed the balance then available in the decommissioning fund . . . ." Stipulation ¶ 13.1. And the Record reflects that the United States General Accounting Office has studied the problem of decommissioning and has concluded that estimates of the costs of decommissioning are difficult to make and probably understate the true cost of the process.

> No large commercial nuclear power plant has been decommissioned in this country. As a result, little actual cost data exists, and decommissioning estimates range from the tens of millions to $3 billion for a plant.
> Most experts we contacted believe that NRC's [1985-1987] estimates are too low. . . . The effect of low estimates is that nuclear facility operators may not have sufficient funds available for decommissioning activities when the plants' useful lives end.

Stipulation ¶ 13.3.

In short, the Special Master's conclusion that New Hampshire was entitled to treat nuclear power plants differently for purposes of taxation than conventional generating facilities was supported by the record. Plaintiffs and Intervenors agreed that the tax was fairly related to the State's services. The legislature found that there was a significant difference in the burdens posed by nuclear power plants. Ch. 83-D:1. The record showed that there are special risks and burdens presented by

nuclear power plants. It showed that the resources of the State must be available to finance enormous costs to deal with events that cannot be predicted and to deal with events, like decommissioning, that are certain to occur, but the cost of which is difficult to estimate.

Finally, the Special Master's conclusion was supported by the decisions holding that, contrary to Intervenors' suggestion, tax revenues do not have to be "accumulated or otherwise segregated in a special fund for future use" for services related to the taxpayer's activities. Intervenors' Brief at 4. No test under *Complete Auto* calls for "a factual inquiry into the relationship between the revenues generated by a tax and costs incurred on account of the taxed activity." *Commonwealth Edison Co v. Montana*, 453 U.S. 609, 627 (1981). The *Montana* Court rejected the argument that such an inquiry was required as "a misconception about a court's role in cases such as this." 453 U.S. at 627.

Intervenors' implicit suggestion that they have no responsibility to support the general services provided by the State of New Hampshire is indefensible. All citizens must bear a share of the general costs of government and none is entitled to an *a la carte* accounting of the costs of those services they use directly. *Goldberg v. Sweet*, 109 S.Ct. 582, 592 (1989) ("[I]nterstate commerce may be required to contribute to the cost of providing all governmental services, including those services from which it arguably receives no direct 'benefit'.") The Nuclear Property Tax is not a "user fee" or a "specific charge" for state services, but rather, like the severance tax in *Montana*, is "imposed for the general support of the government." General revenue taxation does not simply recover the costs and "specific" burdens associated with the taxed activity, but rather the revenues primarily contribute to "the cost of providing 'police and fire protection, the benefit of a trained work force, and the advantages of civilized society.'" *Montana*, 453 U.S. at 624 (quoting *Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 207,

228 (1980)). "The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes." *Cotton Petroleum Corporation v. New Mexico*, 104 L. Ed. 2d 209, 235-36 (1989).

In short, Intervenors' argument that there is no difference between nuclear property and other types of property is wrong and their suggestion that New Hampshire had to segregate Nuclear Property Tax revenue for specific purposes is also incorrect. Intervenors' entire challenge to the Special Master's recommendation that New Hampshire was entitled to classify Nuclear Property differently from fossil fuel and hydro plants for purposes of taxation is unsupported by the record or, as Section C below indicates, by the law.

B. Intervenors Did Not Meet Their Burden Of Proof That A Property Tax Discriminates Against Interstate Commerce

Intervenors assert that the Special Master should not have approved New Hampshire's classification because it results in discrimination. But Intervenors failed to meet their burden of proof by demonstrating that any discrimination results from the Nuclear Property Tax. They essentially concede that the property tax by itself is "facially neutral" and that no discrimination "appears on the face of the tax statute." Intervenors' Brief at 10. No other conclusion is possible because, as Intervenors admit, "each owner pays tax at the same rate regardless of whether it serves interstate or intrastate commerce." Intervenors' Brief at 13.

Intervenors therefore argue that the Special Master's conclusion was inconsistent with "showings of discriminatory effect." Intervenors' Brief at 6. But there were no such showings. The

facts in the record demonstrate that the Nuclear Property Tax standing alone has had absolutely no discriminatory effect.

Intervenors' first suggest that discrimination was shown because Seabrook is "predominantly engaged in interstate commerce." Intervenors' Brief at 6. They assert elsewhere that the plant is a facility "primarily serving interstate commerce." *Id.* at 8. Even if this were relevant in determining whether the property tax itself is discriminatory, the record establishes a very different factual picture than the one Intervenors attempt to paint.

The record does not support Intervenors' contention that Seabrook primarily serves interstate commerce. It demonstrates that the plant serves both intrastate and interstate commerce, that the plant's intrastate activity is very substantial and, although it cannot be determined precisely from the record, that such intrastate activity may even exceed its interstate activity.

The record plainly establishes that "[e]lectricity generated at Seabrook Station is sold in both intrastate and interstate commerce." Stipulation ¶ 5.1. Power from the plant flows into the New England Power Pool transmission grid "in accordance with the physical laws of electricity." Stipulation ¶ 6.5. It is distributed throughout the network "based on relative impedances of alternate paths." Stipulation ¶ 6.5. Some of those paths lead to New Hampshire; others lead to the Plaintiff States. But it can hardly be said from this record that the plant is primarily serving interstate commerce.

The record in fact contains evidence that a very significant portion of the power generated at Seabrook is sold to customers in New Hampshire. More than 35% of the output of the plant has gone to Public Service Company of New Hampshire ("PSNH") and still goes to PSNH, despite the transfer of PSNH's interest in Seabrook to North Atlantic Energy Corpo-

ration ("North Atlantic"), a subsidiary of Northeast Utilities, as part of the bankruptcy reorganization of PSNH. Stipulation ¶ 5.26. More than 2% of the electricity goes to New Hampshire's other major electric utility, the New Hampshire Co-op. Stipulation ¶¶ 5.28-5.29. A portion of New England Power's 9.95% interest in Seabrook's output goes to another New Hampshire utility, Granite State Electric Company. Stipulation ¶¶ 5.11, 5.14. Finally, a New Hampshire wholesale utility, EUA Power Company, obtains more than 12% of Seabrook's electricity. The record does not reflect whether all of this output is ultimately consumed in New Hampshire or whether some of it goes out of state because the disposition of the power changes from time to time, depending on transactions in the wholesale market for electricity. Stipulation ¶¶ 3.17, 5.31.

Intervenors make a related argument that the Nuclear Property Tax discriminates because it imposes "a special tax burden largely on out-of-state business." Intervenors' Brief at 4. They assert that the statute "targets out-of-state interests for a special burden," Intervenors' Exceptions at 3. They explain this contention by asserting that the plant is "owned predominantly by 'out-of-state interests,'" stating at one point that "close to 98%" of the plant is now owned by such interests. Intervenors' Brief at 7, 12 n.7. These assertions are inconsistent with the evidence in the record and misleading.[1]

The record establishes that 35.56942% of Seabrook is owned by a New Hampshire corporation, North Atlantic, that sells all

[1] The record does indicate that about 98% of any future benefits from the credit against the Business Profits Tax will go to out-of-state owners and holding companies, but that is because Business Profits Taxes are paid for combined groups and some of Seabrook's New Hampshire owners — North Atlantic/PSNH and EUA Power — are owned by out-of-state holding companies. The New Hampshire owners and their customers continue to pay the Nuclear Property Tax themselves. As indicated herein, they pay about one half of the tax.

of its share of the plant's electricity to PSNH, which serves New Hampshire customers. Stipulation ¶¶ 3.7, 5.26-5.27. Another 2.17391% is owned by the New Hampshire Co-op, which sells to customers in New Hampshire. Stipulation ¶¶ 3.8, 5.28-5.30. When added to the 12.13240% of Seabrook owned by New Hampshire's EUA Power Company, the total percentage of Seabrook owned by "in-state businesses" is 49.88%.[2] Thus, Intervenors' contention that the tax is targeted at out-of-state businesses is inconsistent with the facts in the record.

C. Intervenors' Attempted Distinctions Of The Cases Relied On By The Special Master Are Unavailing

Intervenors conceded at oral argument before the Special Master that there is no case in point supporting their argument that New Hampshire lacks the power to classify Nuclear Station Property for taxation. The Special Master appropriately cited this Court's recent decision in *Nordlinger v. Hahn*, 112 S.Ct. 2326 (1992), for the proposition that states have broad power to classify for purposes of taxation. This broad authority, coupled with the legislative findings set forth in the preamble to the statute and the facts in the record demonstrating that there are special risks and burdens posed by nuclear reactors, required rejection of Intervenors' challenge to the statute's classification.

Intervenors dismiss the Special Master's citation of *Nordlinger*, suggesting that, even if New Hampshire's classification of nuclear (as opposed to non-nuclear) property is permissible under the Equal Protection Clause, it is impermissible under the Commerce Clause. But insofar as Intervenors are arguing that there is no difference between nuclear and non-

[2] Also, Granite State collects a portion of New England Power's Nuclear Property Tax through rates charged in New Hampshire resulting in over 50% of the tax being paid by New Hampshire concerns. Stipulation ¶ 5.14.

nuclear property, the same factors that sustain the classification under the Equal Protection Clause would sustain it under the Commerce Clause. Intervenors have cited no authority for the proposition that the result of an assessment of the differences between nuclear and non-nuclear property would vary depending upon the clause of the Constitution at issue.

Insofar as Intervenors are arguing that nuclear property is an invalid classification under the Commerce Clause because half or more of the burden of the Nuclear Property Tax falls on interstate utilities, their classification argument has been rejected by the Commerce Clause cases. With respect to this aspect of their argument, Intervenors concede that there is no discrimination on the face of the statute because it applies to all owners of nuclear property. Intervenors' Brief at 10. Intervenors could hardly argue that the statute discriminated against interstate commerce if Seabrook had been owned entirely by New Hampshire utilities serving New Hampshire customers. Yet on the face of the statute this could well have been the case.

Thus, Intervenors' entire Commerce Clause classification argument is that the statute discriminates in effect. But their evidence is merely the "adventitious consideration" that half or more of Seabrook is presently owned by interstate utilities, a consideration that was rejected as evidence of discrimination in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 618 (1981). Intervenors attempt to distinguish the *Montana* case cited by the Special Master is as unsuccessful as their attempt to distinguish *Nordlinger*. The distinction assumes the conclusion — that a statute classifying Nuclear Station Property would be discriminatory — because Intervenors contend that the only nuclear plant in New Hampshire (Seabrook Station) is "used primarily in interstate commerce" and therefore cannot be separately classified for taxation. Intervenors' Brief at 15. Intervenors concede that *Montana* holds that a State tax may fall "predominately on interstate commerce" without violating the Commerce Clause. *Id.* They also concede that, under the

principles of *Montana*, a property tax could be imposed on electrical generating plants, even if the electricity produced "largely traveled out of state." *Id.* And yet they argue that when the words of the property tax statute are changed from "electrical generating property" to "nuclear generating property," the Constitutional result changes. The line Intervenors seek to draw is a line that does not appear in the *Montana* decision and the Special Master's refusal to make such an artificial distinction was consistent with the caselaw and the Commerce Clause.

The only other authority cited by Intervenors in support of their fallback claim, *Complete Auto Transit Inc v. Brady*, 430 U.S. 274 (1977), provides no basis for rejecting the Special Master's conclusion. The footnote from *Complete Auto* on which Intervenors rely explained why the Court's new focus on the practical effects and economic realities of state taxes was more appropriate than the per se rule of *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951), which focused on labels and invalidated taxes if they were on the "privilege" of engaging in an interstate business. 430 U.S. 288-289 n.15. The point of the footnote is that not only a "privilege" tax but any other form of tax could be "tailored to single out interstate businesses" and, therefore, the effects of the tax, not its form, should determine its constitutionality.

Here, the parties have stipulated that three of the four *Complete Auto* tests that footnote 15 addressed are satisfied. With respect to the only test at issue — the test of discrimination — the facts in the record demonstrate that the Nuclear Property Tax does not single out interstate businesses for taxation that local businesses avoid, any more than the severance tax in *Montana* did. The same arguments based on *Complete Auto's* footnote 15 were made and rejected in the *Montana* case. 453 U.S. at 638-644. And the facts in this case cited in support of the

"tailored tax" argument are substantially less persuasive than the facts that the Court found insufficient to support the argument in *Montana*.

In *Montana*, the "great bulk of the coal mined in Montana," as much as 90%, was exported to other states. 453 U.S. at 639. As a result, consumers in those states had to bear the burden of a tax that raised almost 20% of Montana's total tax revenue. *Id.* at 642. Here, it is undisputed that the property being taxed is engaged in intrastate *and* interstate commerce; that about one half of the tax is paid by New Hampshire corporations; that a large percentage of the tax is ultimately passed on to New Hampshire consumers of electricity and that, in total, the tax accounts for only about 3.5 % of New Hampshire's General Fund expenditures. Stipulation Exhibit 6 at 26. There is nothing in the *Complete Auto* Court's footnote 15 that would invalidate such a tax.

Finally, as with their other arguments, Intervenors' contention that the Nuclear Property Tax, standing alone, violates 15 U.S.C. § 391 is unsupported by any decision. The Special Master was correct in rejecting the Section 391 argument "for the same reasons" he recommended rejection of Intervenors' argument under the Commerce Clause. Final Report at 19 n.11. Not only is there no decision supporting the claim, but the language of the statute to which Intervenors refer rejects it. Section 391 discrimination exists if there is "a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce." 15 U.S.C. § 391. The statute is not concerned with whether the tax is paid primarily by in-state or out-of-state taxpayers, which is all that Intervenors' fallback argument considers. The statute is concerned instead with whether the Seabrook owners who sell electricity in New Hampshire pay property taxes at the same rate as owners who sell in other states. The answer, of course, is that they do because the same rate applies to everyone. Thus, there is no way

that electricity sold in interstate commerce bears a "greater tax burden", as the statute requires, than electricity sold in New Hampshire. Intervenors' classification argument under Section 391 is inconsistent with the very statutory language they cite.

D. Intervenors' References To Comments By One State Legislator Are Irrelevant

Intervenors quote some statements made by an individual legislator, Representative Hayes, in the New Hampshire House of Representatives in support of the proposition that The Nuclear Property Tax targets out-of-state interests. Intervenors' Brief at 5. But "[w]hether any statute or action of a state impinges upon interstate commerce depends upon the statute or action, not upon what is said about it or the motive which impelled it." *Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 259 (1922). Moreover, the best evidence of the purpose of the statute is the statute itself and its detailed preamble, not "statements of individual legislators . . . during the course of the enactment process." *West Virginia University Hospitals, Inc. v. Casey*, 111 S. Ct. 1138, 1147 (1991). The statute and its preamble reveal no suggestion that out-of-state businesses are being targeted.

And, when the actual effect of the statute is considered, the facts in the record demonstrate that the Nuclear Property Tax does not target out-of-state interests. It is paid by the owners of Nuclear Station Property in proportion to their ownership interests. Because roughly half of Seabrook is owned by out-of-state corporations, half of the tax is paid by them. Any argument that nonresidents owning property in New Hampshire and engaging in interstate commerce cannot be required to pay their proportionate share of an *ad valorem* property tax is foreclosed by settled law discussed at pages 17-20 of New Hampshire's Brief in Support of Exceptions.

The comments of Representative Hayes are no different than the observations of one of the principal sponsors of the severance tax bill upheld in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 641 n.6 (1981). They do not affect the validity of New Hampshire's Nuclear Property Tax any more than they affected the validity of Montana's severance tax. At most, the comments of Representative Hayes reflect how politically sensitive the task of raising revenue is in a State, such as New Hampshire, that has chosen not to impose a personal income tax or a sales tax. Stipulation ¶ 11.2. Legislators, such as Representative Hayes, are confronted with the unpopular fact that New Hampshire residents pay substantial income taxes to adjoining states. Fifty two percent of New Hampshire's citizens live in the two counties closest to Boston, Hillsboro and Rockingham, Massachusetts. Many of these residents live in New Hampshire, but work in Massachusetts, paying Massachusetts income taxes.[3] Stipulation ¶ 12.1. Many of the fifty seven percent of Massachusetts residents who live in the four counties bordering New Hampshire may derive their living in New Hampshire, but, because the state has no income tax, contribute no income tax revenue to New Hampshire. Stipulation ¶ 12.2. It is not surprising, therefore, that Representative Hayes remarked that the out-of-state owners of Seabrook, who receive the benefits of the power generated by a large nuclear reactor without having to live with it in their own state — "the other fellows" — will be paying their fair share of the tax burden from the Nuclear Property Tax. In a state, such as New Hampshire, that relies heavily on property taxes to finance local governments, the occasional presence of out-of-state owners of a significant piece of property is a factor worthy of note in legislative debate. There is nothing whatsoever untoward

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[3] In the hearing on House Bill 64 held on May 2, 1991, Representative Hayes indicated that "there are over 50 million dollars of taxes paid by New Hampshire citizens to the Commonwealth of Massachusetts."

about Representative Hayes' comments and they provide no support for Intervenors' fallback claim.

E. New Hampshire Is Exercising Its Rights Under *McKesson*

In its opening Brief in Support of Exceptions, New Hampshire advised the Court that it wished to exercise its right under *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), to effect a cure of any defect that may be found in its Nuclear Property Tax statute. On March 26, 1993, a bill was introduced in the New Hampshire Senate and House of Representatives in General Court to effect such a cure. The bill, a copy of which is attached as Exhibit A, repeals the Nuclear Property Tax credit against the Business Profits Tax effective as of July 1, 1991 and provides for collection of all Business Profits Taxes that were avoided by Seabrook Owners by use of the Credit.[4] It also substitutes as of July 1,1991 a severability clause for the nonseverability clause on which the Special Master relied in his Final Report and reaffirms the General Court's original intent that, under the previous clause, if the entire statute were ever invalidated, the invalidation was to have been prospective only. Finally, to eliminate any question about the need for a "backward-looking" remedy, the bill provides that the $35.455 million of Nuclear Property Taxes collected since the Nuclear Property Tax statute was enacted will be refunded in the future over a three year period ($33

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[4] Because the Nuclear Property Tax took effect on July 1, 1991 and Business Profits Tax returns are filed annually (often after extensions), the only returns filed as of the date of the Final Report were returns for 1991. Four out-of-state owners claimed a total of $1,470,620 of credits on those returns. Stipulation ¶ ¶ 7.10, 7.15, 7.33 and 7.40. Plaintiffs' projections indicated that $4,829,644 of credits may be claimed on the 1992 returns to be filed this year. Stipulation ¶ ¶ 8.5, 8.7, 8.13 and 8.23.

million in the first two years) through offsets against future Nuclear Property Tax payments.

When adopted, these amendments to the statute will resolve the issues raised in the Special Master's Final Report and will eliminate the bases on which he recommended that the tax be invalidated. New Hampshire will inform the Court immediately when the legislation has been enacted and signed by the Governor.

F. Conclusion

For the foregoing reasons, the Special Master's Recommendation that the Court hold that the Nuclear Property Tax standing alone (without the credit) is valid under the Commerce Clause and 15 U.S.C. ¶ 391 should be adopted. For the reasons stated in New Hampshire's opening brief and because of the pending amendment to the Nuclear Property Tax statute, the Complaints of Plaintiffs, the Intervening Utilities and the amici curiae challenging the Nuclear Property Tax should be dismissed and judgment should be entered in favor of New Hampshire.

Respectfully submitted,

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April 7, 1993

**Counsel of Record*

No. 119, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF CONNECTICUT,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,

Plaintiffs,

v.

STATE OF NEW HAMPSHIRE

Defendant.

ON THE REPORT OF THE SPECIAL MASTER
OF DECEMBER 30, 1992

APPENDIX

Exhibit A

2060B
93-1099
08

HOUSE BILL NO: 53-FN-A
INTRODUCED BY:
REFERRED TO:
AN ACT: repealing the credit to the business profits tax payment of the nuclear property tax, repealing the nonseverability of the credit to the business profits tax, and reinstating the franchise tax on electric utilities.

ANALYSIS

This bill:

(1) Repeals the nuclear property tax credit against the business profits tax as on July 1, 1991.

(2) Adds electric utilities to the list of utilities under the franchise tax.

(3) Refunds nuclear property tax revenues collected to date by providing a credit against the nuclear property tax over a 3-year period.

(4) Collects business profits tax avoided through the use of the nuclear property tax credit by reducing the refund credit allowed for the nuclear property tax by the amount of business profits tax avoided.

(5) Increases the nuclear property tax rate from .64 to .78 percent of valuation.

This bill is a request of the governor.

EXPLANATION: Matter added appears in ***bold italics.***
Matter removed appears in [brackets].
Matter which is repealed and reenacted or all new appears in regular type.

STATE OF NEW HAMPSHIRE

In the year of Our Lord one thousand
nine hundred and ninety-three

AN ACT

REPEALING THE CREDIT TO THE BUSINESS PROFIT TAX FOR PAYMENT OF THE NUCLEAR PROPERTY TAX, REPEALING THE NONSEVERABILITY OF THE CREDIT TO THE BUSINESS PROFITS TAX, AND REINSTATING THE FRANCHISE TAX ON ELECTRIC UTILITIES.

Be it Enacted by the Senate and House of Representatives
in General Court convened:

1 Declaration of Purpose and Finding for Repeal of Credit and the Nonseverability Clause under 1991, 354:19. The general court finds that:

I. The constitutionality of the nuclear property tax has been called into question by a lawsuit initiated in the United States Supreme Court.

II. A Special Master appointed by the United States Supreme Court has recommended that the Court invalidate the nuclear property tax asserting that the credit against the business profits tax, provided in RSA 83-D:6 and RSA 77-A:5, VI is discriminatory and that the nonseverability provision of 1991, 354:19 indicates an intent that if the nuclear property tax is invalidated, such invalidation be as of the date of enactment, July 1, 1991.

III. If the United States Supreme Court adopts the recommendations of its Special Master, the state could no longer collect the nuclear property tax, and all moneys collected under the nuclear property tax would be refunded.

IV. The nuclear property tax is an important source of revenue for the state and, while the general court believes the tax as enacted is constitutional, the state cannot afford to risk losing the revenue from the tax.

V. To avoid the risk of (a) losing the future revenues of the tax and (b) having to refund the moneys collected under the nuclear property tax within 30 days after an adverse ruling by the United States Supreme Court as recommended by the Special Master, the credit to the business profits tax should be repealed as of July 1, 1991.

VI. The general court enacted 1991, 354:19 to ensure the prospective termination of 1991, 354:1, in the event 1991, 354:2 is declared unconstitutional, but the report of the Special Master recommends retroactive termination; the repeal of 1991, 354:19 reaffirms the general court's original intent to make the nonseverability clause prospective only.

2 Franchise Tax; Public Utility Redefined. Amend RSA 83-C:1, II to read as follows:

II. "Public utility" means every person, partnership, association and corporation except municipal corporation, engaged within this state in the manufacture, generation, distribution, transmission, or sale of gas ***or electric energy.***

3 Franchise Tax; Gross Receipts Redefined. Amend RSA 83-C:1, IV to read as follows:

IV. "Gross receipts" means all receipts [received or accrued] of the public utility ***received or accrued*** from the sale of gas ***or electricity*** pursuant to franchises granted by this state. Gross receipts do not include receipts from sales of gas ***or electricity*** for use outside the state, or receipts from sales of gas ***or electricity*** to another public utility which is also subject to the payment of this tax.

4 Nuclear Station Property Tax Rate. Amend RSA 83-D:3 to read as follows:

83-D:3 Tax Imposed. A tax is imposed upon the value of nuclear station property at the rate of [.64] ***.78*** percent of valuation, to be assessed annually as of April 1 and paid in accordance with this chapter.

5 New Paragraph; Credit for Nuclear Property Tax Previously Collected. Amend RSA 83-D:7 by inserting after paragraph V the following new paragraph:

VI. The commissioner of revenue administration shall allow aggregate credits against the tax imposed by this chapter in the amount of $16,500,000 for such taxes due on January 15, 1994, $16,500,000 for such taxes due on January 15, 1995, and $2,455,793 for such taxes due on January 15, 1996. The aggregate credit shall be allocated to each person in the same proportion as such person's nuclear property ownership interest bears to the entirety of the ownership in the property.

6 Severability Clause. Amend 1991, 354:20 to read as follows:

354:20 Severability. [Except as provided in section 19,] If any provision of this act or the application thereof to any person or circumstance is held to be invalid, the invalidity shall not affect any other provision or the application of such provision to other persons or circumstances, and to this end the provisions of this act are severable.

7 Collection of Business Profits Tax. The commissioner of revenue administration shall collect whatever business profits tax may have been avoided by a person through application of the credit provided by RSA 77-A:5, VI, in the following manner: the portion of the credit due January 15, 1994, allocable to a person under RSA 83-D:7, VI, shall be reduced by an amount equal to the amount of business profits tax previously avoided

by that person through application of the credit provided by RSA 77-A:5, VI. If such reduction is insufficient to recover all the additional business profits tax due from a person, that person's allocable share of the credits due in 1995 and 1996 under RSA 83-D:7, VI, respectively, shall be reduced until the business profits tax avoided by the person has been recovered. No interest or penalty shall be assessed for taxes collected under this section.

8 Repeal. The following are repealed:

I. RSA 77-A:5, VI, relative to a credit against the business profits tax for payment of the nuclear property tax.

II. RSA 83-D:6, relative to providing a credit against the business profits tax for payment of the nuclear property tax.

III. 1991, 354:19, relative to the nonseverability of the business profits tax credit from the imposition of the nuclear property tax.

9 Effective Date.

I. Sections 1 and 6-8 of this act shall take effect upon its passage, and shall apply to returns and taxes due on account of taxable periods ending on or after July 1, 1991.

II. Section 5 of this act shall take effect upon its passage, and shall apply to returns and taxes due on account of taxable periods ending on or after January 1, 1993.

III. Section 4 of this act shall take effect upon its passage, and shall apply to returns and taxes due on account of taxable periods ending on or after January 1, 1994.

IV. The remainder of this act shall take effect upon its passage.

LBAO
LSR 93-1099
3/25/93

FISCAL NOTE for an act repealing the credit to the business profits tax for payment of the nuclear property tax, repealing the nonseverability of the credit to the business profits tax, and reinstating the franchise tax on electric utilities.

FISCAL IMPACT:

The Nuclear Property Tax produces approximately $24 million each year, with approximately $35 million received to date. The proposed amendments would substantially increase the likelihood that the United States Supreme Court will not invalidate the Nuclear Property Tax. Prospectively, the Nuclear Property Tax will produce approximately $24 million each year, which will be reduced by $16.5 million in 1993, $16.5 million in 1994, and approximately $2.5 million in 1995. The effect of removing the NPT credit for 1991 and 1992 will be to increase the BPT receipts for 1993 by approximately $4 million. It is estimated that the repeal of RSA 77-A:5, VI will produce approximately $2 million in Business Profits Tax revenues in 1993 and $4 million in 1994. The reimposition of the Franchise Tax is estimated to produce approximately $6 million in 1993 and $10 million in 1994.

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No. 119 Original

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

STATE OF CONNECTICUT, *et al.*,
Plaintiffs,
v.
STATE OF NEW HAMPSHIRE,
Defendant.

On Exceptions to the Final Report of the Special Master

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Defendant.

On Exceptions to the Final Report of the Special Master

REPLY BRIEF FOR INTERVENORS

This case involves a challenge to the New Hampshire "Tax on Nuclear Station Property" (N.H. Rev. Stat. Ann. Ch. 83-D) and an accompanying credit for payment of that tax against liability for the New Hampshire Business Profits Tax (N.H. Rev. Stat. Ann. Ch. 77-A:5). The Special Master recommended that this Court hold these tax measures, taken together, to be in violation of the Commerce Clause of the United States Constitution, art. I, § 8, cl. 3, and of the provisions of 15 U.S.C. § 391. The Special Master further recommended that this Court award retroactive relief in the form of refunds of the tax paid less any credit taken against liability for business profits taxes. Intervenors [1] urge that the Court adopt the recommendations of the Special Master and, consequently, overrule the exceptions lodged by New Hampshire.

[1] Intervenor The Connecticut Light and Power Company does not participate in this filing.

STATEMENT

1. *The New Hampshire Tax System.* In 1991 the New Hampshire legislature, endeavoring to increase state revenues, enacted a "Tax on Nuclear Station Property." 1991 N.H. Laws c. 354 (to be codified at N.H. Rev. Stat. Ann. ("RSA"), Chapter 83-D) (the "Seabrook Tax"). The legislature did not just enact a new tax, however; it provided, at the same time, that payment of the Seabrook Tax would be allowed as an offset against liability for a second tax: the New Hampshire Business Profits Tax. 1991 N.H. Laws c. 354.2 (to be codified at RSA ch. 77-A:5, VI).[2] Pursuant to the New Hampshire statutes, any payment of the Seabrook Tax may be taken as a credit, dollar-for-dollar, against tax owed on New Hampshire business profits. The effect of the Seabrook Tax thus varies with respect to each owner, according to the extent of New Hampshire business profits that it earns.

a. *The Seabrook Tax.* The Seabrook Tax is an *ad valorem* tax imposed upon "nuclear station property." The statute defines the property subject to the tax as "the land, buildings, structures, tunnels, machinery, dynamos, apparatus, poles, wires, nuclear fuel and fixtures of all kinds and descriptions used in generating, producing, supplying and distributing electric power or light from the fission of atoms, exclusive of transmission lines." Ch. 83-D:2. As the Special Master noted, "[t]he only nuclear generating station in New Hampshire (and thus the only facility affected by the tax) is the Seabrook Station located in the town of Seabrook, New Hampshire." Final Report 2 n.1. *See* Stip. ¶ 3.2 & 3.3.[3]

[2] In the legislation imposing the Seabrook Tax, New Hampshire repealed its franchise tax insofar as it applied to sales of electricity. 1991 N.H. Laws c. 354:3.

[3] The Seabrook Nuclear Station, like other facilities generating electricity in New Hampshire, is subject to local property taxes. Final Report 6 n.3; Stip. ¶ 3.3. No statewide property tax is imposed on other generating facilities. Final Report 6 n.4.

The tax is imposed at the rate of 0.64% of the value of the nuclear station property. Ch. 83-D:3. The 1991 Act established a maximum initial value of the Seabrook Station at $3.5 billion, Ch. 83-D:9, but it provided for subsequent valuation by the commissioner of revenue administration. Ch. 83-D:4. "The tax is assessed on each of the joint owners of nuclear station property in proportion to its ownership share." Final Report 7. *See* Ch. 83-D:5. Liability is several, not joint or joint and several. Stip. ¶ 3.5.

b. *The New Hampshire Business Profits Tax.* The State also imposes a tax "upon the taxable business profits of every business organization." Ch. 77-A:2. For a business deriving "gross business profits from business activity both within and without this state," New Hampshire provides that the business should apportion its profits "so as to allocate to this state a fair and equitable proportion of such business profits." Ch. 77-A:3.

The primary method of apportioning business profits is a three-part weighted formula set forth in the statute. Ch. 77-A:3; *see* Final Report 10. According to the formula, an organization doing business both intrastate and interstate must calculate the percentages of in-state property compared to all property, in-state compensation compared to all compensation, and in-state sales compared to all sales. The business then averages the three percentages, after giving added weight to the sales factor, to arrive at the ratio of business profits to be treated as New Hampshire business profits. *See* Final Report 9-10.[4]

The tax rate imposed on the New Hampshire share of business profits is 8 percent. Ch. 77-A:2. As a result of the credit provision, therefore, a Seabrook owner paying $1 million in Seabrook Tax would be able to earn up

[4] The property percentage and the compensation percentage are added to 1.5 times the sales percentage, and then the resulting sum is divided by 3.5. 1991 N.H. Laws c. 354:7 (to be codified at RSA ch. 77-A:3, II(a)).

to $12.5 million in business profits without incurring additional tax liability—provided, of course, that the business profits were earned in New Hampshire. The credit provision gives assurance that only one tax is due for the activities of owning Seabrook and earning business profits (up to the point that the credit is exhausted), so long as the profits are local and not generated in other States.

The link between the Seabrook Tax and the New Hampshire Business Profits Tax is reaffirmed by another provision of the statute: the Nonseverability Clause. 1991 N.H. Laws c. 354:19. That clause states that "[i]t is the intent of the legislature that sections 1 and 2 of this act [the Seabrook Tax and the credit against Business Profits Tax] be considered a unit and their provisions inseparable." *Id.* It then goes on to provide explicitly that "[i]f any provision of sections 1 and 2 of this act is declared unconstitutional, then sections 1 and 2 and all of their provisions shall be invalid." *Id.*

2. *Operation of the New Hampshire Tax System.* Each of the intervenors owns part of the Seabrook Nuclear Station. *See* Stip. ¶¶ 1.3-1.9. As an owner, each is liable for a *pro rata* share of the Seabrook Tax. Moreover, except for Taunton Municipal Lighting Plant, each is subject to taxation on its business profits in New Hampshire and other States in which it conducts business.[5]

a. *Payments of Seabrook Tax.* The Seabrook Tax was imposed with an effective date of July 1, 1991, and payments for 1991 were limited to one-half of the amount that would be due on an annual basis. Final Report 7. *See* Stip. ¶ 4.1; Ch. 354:21 & 83:D-9. For that six-month period, the Seabrook owners as a whole paid approximately $11.2 million in Seabrook Tax. Final Report

[5] A complete listing of Seabrook owners, and their respective shares of ownership, is set forth in Appendix A of the Final Report and in the Stipulation at ¶¶ 3.6-3.18.

7; *see* Stip. ¶ 4.2.[6] Intervenors' share amounted to $4.26 million (38%). *Id.*

The valuation for 1992 is expected to increase to just under $3.75 billion. Final Report 8; *see* Stip. ¶ 4.3. Based upon that figure, the total Seabrook Tax payments for 1992 amount to approximately $24 million. Final Report 8; *see* Stip. ¶¶ 4.4-4.7. Intervenors' share of that figure would be $9.125 million (38%). *Id.*

The Special Master found that owners of Seabrook are passing on the Seabrook Tax in the wholesale and retail rates charged to their customers. Final Report 8-9 & App. B; *see* Stip. ¶¶ 5.5-5.20. For example, Canal Electric Company has included the Seabrook Tax in the wholesale rate, approved by the Federal Energy Regulatory Commission (FERC), charged to Commonwealth Electric Company and Cambridge Electric Light Company. *See* Final Report App. B; Stip. ¶ 5.6. Those companies, in turn, have included the Seabrook Tax, passed through to them by Canal, in the retail rates charged to their Massachusetts customers, pursuant to approvals given by the Massachusetts Department of Public Utilities in October 1991. *See* Final Report App. B; Stip. ¶¶ 5.7, 5.8. Similarly, New England Power has included the Seabrook Tax, with FERC approval, in wholesale rates charged to various affiliated companies, Stip. ¶ 5.11, which have then passed on the tax to customers in Massachusetts, Rhode Island, and New Hampshire. Final Report App. B; Stip. ¶¶ 5.12-5.14. Montaup has included the Seabrook Tax in wholesale rates, approved by FERC (Stip. ¶ 5.15), to affiliated companies that have passed on the tax to customers in Massachusetts and Rhode Island. Final Report App. B; Stip. ¶¶ 5.16-5.20.[7]

[6] For simplicity, the figures used in this section are approximate. Exact figures are set forth in the Final Report at Appendix A and in the Stipulation at the indicated paragraphs.

[7] *Amicus curiae* Massachusetts Municipal Wholesale Electric Cooperative ("MMWEC") has been passing through the Seabrook Tax as well. *See* Final Report App. B; Stip. ¶¶ 5.9-5.10.

Other Seabrook owners are passing, or will pass, the Seabrook Tax on directly to retail customers. Taunton Municipal Lighting Plant and the Town of Hudson (Massachusetts) Light and Power Department, neither of which is required to obtain regulatory approval, have included the Seabrook Tax in the calculation of rates charged to customers in Massachusetts. Final Report App. B; Stip. ¶¶ 5.21-5.22. United Illuminating Company received authorization from the Connecticut Department of Public Utility Control to recover the Seabrook Tax in rates effective on January 1, 1993. Final Report 9; Stip. ¶ 5.23.

b. *Use of the Seabrook Tax to Offset Business Profits Taxes.* Each of the Seabrook owners and its affiliated companies—excepting owners exempt from income taxes as governmental entities—is subject to taxation on its business profits. Not only does New Hampshire tax business profits, but Connecticut, Massachusetts, and Rhode Island do as well. Final Report 11-12; Stip. ¶ 2.4. Each State provides that, for multi-state businesses, the tax on business profits should be calculated after apportionment of business profits to reflect the amount of business conducted in that State. Final Report 9-10.

The liability of each Seabrook owner for tax on its overall business profits is directly affected by the credit provision contained in the New Hampshire statute. Because the credit provides an offset only against profits earned locally, the ability of a Seabrook owner to shelter its business profits from taxation depends on the extent to which its profits are earned in New Hampshire. For example, United Illuminating Company will pay approximately $4.2 million in Seabrook Tax for 1992; it thus would be able to earn up to $52.5 million in New Hampshire business profits for 1992 without any additional tax liability.[8] However, given that United Illuminating has

[8] As previously noted, with a dollar-for-dollar credit for the amount paid in Seabrook Tax and a tax rate of 8 percent on business profits, a Seabrook owner is able to earn $12.50 in New Hampshire business profits tax-free for each dollar of Seabrook Tax.

no sales or employees or property (other than Seabrook) in New Hampshire, virtually all of its $26.4 million in business profits is earned *outside of* New Hampshire—specifically in Connecticut. United Illuminating is able, therefore, to shelter only slightly less than $3.6 million of its profits from taxation, while remaining subject to taxation in other States on the remaining $22.8 million.

Other Seabrook owners, likewise, face higher overall taxation on their business profits solely because they do business in States other than New Hampshire.[9] In 1992 Canal will pay slightly under $850,000 in Seabrook Tax. If Canal conducted a wholly intrastate business within New Hampshire, or otherwise had substantial activities within the State, it could earn as much as $10.5 million in profits without being subject to additional taxation. But the Com/Energy group—a unitary business, of which Canal is a part—earned less than $1 million of its $21 million business profits in New Hampshire, with the rest attributable to other States.[10] As a result, Com/Energy and Canal are fully subject to tax both on their owner-

[9] Given that the New Hampshire apportionment formula includes ownership of property in New Hampshire as one factor, and given that each Seabrook owner by definition owns property (i.e. Seabrook) in New Hampshire, it follows that any profitable Seabrook owner will have some New Hampshire profits. It is the location of other property, as well as the location of personnel and sales, that determines where the remaining business profits are earned.

[10] Ch. 83-D:6 provides that "[i]f the person liable for the [Seabrook Tax] is a member of a unitary business within the meaning of RSA 77-A:1, XIV, then the entire amount of the tax due under this chapter shall be allowed as a credit pursuant to RSA 77-A:5, VI, against the tax liability of such unitary business under RSA 77-A." In the case of a unitary business, therefore, the credit will reduce liability for tax on the business profits of the unitary business as a whole—but, again, only to the extent that those profits are earned in New Hampshire.

ship of Seabrook and, except to a small degree, on their earning of business profits as well.

Some owners of Seabrook have more extensive operations in New Hampshire and, in consequence, a greater amount of New Hampshire business profits. New England Power is part of a unitary business that includes Granite State Electric Company—a New Hampshire utility—and it has both employees and sales in New Hampshire. Paying almost $2.4 million in Seabrook Tax in 1992, it is able to earn nearly $30 million in tax-free business profits, so long as those profits are earned in New Hampshire. Although it falls short of that figure, it is expected to be free of tax liability on $20 million in profits, leaving only $10 million of potentially sheltered income subject to taxation. The situation is similar for Northeast Utilities, which acquired Public Service Company of New Hampshire ("PSNH") in 1992. Using projections for 1993—the first full year following the acquisition—Northeast Utilities, through its subsidiaries North Atlantic Energy Co. and Connecticut Light and Power,[11] will pay an estimated $9.5 million in Seabrook Tax and thus might earn up to $118 million in business profits without further liability. Northeast Utilities will be quite close: its New Hampshire earnings for 1993 are projected to be $104.5 million.

The use of the offset afforded by the Seabrook Tax—like the Seabrook Tax itself—ultimately affects the wholesale and retail rates charged by Seabrook owners. For owners doing business primarily outside of New Hampshire, the credit will do little to reduce the taxes on their overall business profits, and those higher taxes will be passed through to their customers. For example, United

[11] Both Connecticut Light and Power and the North Atlantic Energy Corp. are subsidiaries of Northeast Utilities. Stip. ¶¶ 1.6, 3.7. North Atlantic owns the share of Seabrook previously owned by PSNH, which is now a subsidiary of Northeast Utilities as well. Stip ¶¶ 3.6-3.7.

Illuminating Company pays slightly less than one-half of the amount of Seabrook Tax paid by the Northeast Utilities companies ($4.2 compared to $9.5 million), but, as a result of the fact that its profits are earned primarily in Connecticut, it can shelter from taxation only a small fraction (less than 4%) of the business profits that Northeast Utilities can shelter ($3.6 million compared to $104.5 million). As taxes are then paid to other States on those profits earned outside of New Hampshire, the taxes will be reflected in rates charged to customers of United Illuminating. The same effects will be felt by customers of other Seabrook owners, to a greater or lesser degree depending upon the extent of the owners' business profits in New Hampshire.

3. *This Litigation.* The States of Connecticut, Massachusetts, and Rhode Island initiated this original action—pursuant to article II, § 2, cl. 1 and 2 of the United States Constitution and 28 U.S.C. § 1251(a)(1) (1991)—by filing a motion for leave to file a complaint in this Court. The complaint alleged, among other things, that the Seabrook Tax, taken together with the credit against liability for the New Hampshire Business Profits Tax, violated the Commerce Clause and 15 U.S.C. § 391. The State of New Hampshire opposed the motion for leave to file, asserting that "[t]he character of the injury alleged here . . . is merely economic" (Br. in Opp. at 8), that relief is available in other courts (Br. in Opp. at 9-10), that the claims would require an "[e]xtensive [t]rial" (Br. in Opp. at 10), that the claims were "premature" (Br. in Opp. at 12), and that the injury claimed by the States was "[n]ot [s]erious" (Br. in Opp. at 12). The Court granted the plaintiff States leave to file their complaint. 112 S. Ct. 962 (1992).

The Court subsequently referred the case to the Special Master. 112 S. Ct. 1756 (1992). Several weeks later, the Court also referred the motion by certain Seabrook owners to intervene—which had been filed shortly before

the initial referral to the Special Master—to the Special Master for decision. 112 S. Ct. 1930 (1992). The Special Master then recommended that the motion be granted, noting that "[t]o the extent the regulatory authorities do not allow the Utilities to pass the tax along to consumers through increased rates, the Utilities suffer an immediate injury that the Plaintiff States do not represent." First Interim Report at 8. The Special Master further observed that "[e]ven if the regulatory authorities permit the Utilities to pass the entire tax through to consumers, they still suffer a distinct injury in that increased rates are likely to dampen demand and to raise regulatory resistance to other, independently justified rate increases." First Interim Report at 8.[12] The Court adopted the recommendation of the Special Master and granted the Utilities' motion to intervene. 112 S. Ct. 2961-62 (1992).

Working under the direction of the Special Master, the parties developed a stipulated record in the case. That record was submitted to the Special Master at the Fourth Meeting of Counsel on September 9, 1992. Based upon that record, and the subsequent briefs and argument presented by the parties, the Special Master concluded (and recommended that this Court conclude) that the New Hampshire tax scheme violated both the Commerce Clause and 15 U.S.C. § 391.

The Special Master began with the statutory challenge, determining that New Hampshire had (in the words of the statute) "impose[d] . . . a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-state manufacturers, producers, wholesalers, retailers, or consumers of that electricity." 15 U.S.C. § 391. The Special Master first rejected the argument that the Seabrook Tax—"a tax exclusively on property that by definition is used in generating, producing, supplying and distributing electric power" (Final Report 19)—is somehow not "a tax on or with respect to the generation or transmission of electricity" (15 U.S.C. § 391), finding that narrow construction to be inconsistent with the more inclusive language of Section 391. Final Report 18-19. Then, relying on the decision in *Arizona Pub. Serv. Co. v. Snead*, 441 U.S. 141 (1979) (striking down a New Mexico tax scheme as discriminatory under Section 391), the Special Master concluded that the New Hampshire scheme "replicates the flaw identified by this Court in the New Mexico Electrical Energy Tax scheme: allowance of a credit for a local tax paid against a separate local tax owed, with a resultant discrimination against interstate commerce." Final Report 20.

[12] The Special Master also concluded that "considerations of judicial economy . . . weigh in favor of intervention by the Utilities." First Interim Report at 9.

The Court found the New Hampshire tax scheme to be discriminatory under the Commerce Clause as well. Although New Hampshire had argued that it had done nothing more than enact a neutral *ad valorem* property tax, the Special Master found that description of the tax scheme to be incomplete: "[t]he fact that the Seabrook Tax and the credit provision were enacted in the same legislative act suggests that they were intended to function together to impose a new property tax levy and simultaneously to provide relief in the same amount from the Business Profits Tax on income allocable to New Hampshire business activity." Final Report 27. The Special Master pointed out that, like similar tax schemes invalidated by this Court, the New Hampshire scheme "affirmatively places interstate commerce at a disadvantage by giving preferential tax treatment to companies with more significant intrastate activities." Final Report 28-29; *see, e.g., Maryland v. Louisiana*, 451 U.S. 725 (1981); *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984). The scheme thus was directly contrary to "the principle that a State may not use its power to tax in a manner that places interstate commerce at a disadvantage in competition with intrastate commerce." Final Report 35.

The Special Master noted that "[t]he unconstitutionality of the New Hampshire Seabrook Tax and credit scheme is confirmed by application of the 'internal consistency' test." Final Report 36. If every State were to adopt the tax scheme employed by New Hampshire—the working hypothesis upon which the "internal consistency" test is based—"then utilities owning 'nuclear property' in one State but earning part of their income elsewhere would face a risk of multiple taxation not faced by utility owners conducting all of their business activity within a single State." Final Report 37. Because the New Hampshire scheme uses a tax credit to offset liability for one local tax against liability for a second local tax, it "favors those Seabrook owners earning profits on business activity in New Hampshire over those owners earning equivalent business profits partly in other States." Final Report 37. That favoritism, as the Special Master observed, "is contrary to the basic Commerce Clause principle that 'a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.'" Final Report 37-38 (quoting *Armco, Inc. v. Hardesty*, 467 U.S. 638, 642 (1984)).

Turning to the remedy, the Special Master recommended that this Court provide retroactive relief in the form of a refund of taxes paid less any credit taken against New Hampshire business profits taxes. The Special Master found no basis for making the rulings in this case prospective only, saying both that the recommended decision "results from a straightforward application of existing law to the present facts" (Final Report 40) and that "it reasonably should have been apparent to New Hampshire that its Seabrook Tax and credit scheme was of dubious constitutionality" (Final Report 41). The Court further found the Eleventh Amendment to be no bar to relief, stating that the plaintiff States, as in *Maryland v. Louisiana*, 451 U.S. 725 (1981), were suing "to

recover for injuries to themselves, as well as to the great majority of their citizens," and not for relief "on behalf of specific individuals." Final Report 41. And the Special Master decided that a refund was the proper remedy becauses New Hampshire, by declaring that the Seabrook Tax and credit were nonseverable, had made clear that the provisions were to be "considered a unit." Final Report 43. Given that the tax could not exist without the credit, and given that the tax and credit could not constitutionally exist together, the proper course is to "recogniz[e] that the Seabrook Tax and credit were unconstitutional from the start" and "put the parties back into the positions they would have held if New Hampshire had never adopted its unconstitutional tax scheme." Final Report 44.

SUMMARY OF ARGUMENT

The Special Master correctly concluded that the New Hampshire tax scheme discriminates against interstate commerce in violation of the Commerce Clause and Section 391. Although the Seabrook Tax itself purports to treat all businesses equally, the linkage of that tax, by means of a dollar-for-dollar credit, to payment of a second New Hampshire tax (the Business Profits Tax) creates a clear favoritism for those Seabrook owners doing substantial business in New Hampshire over those Seabrook owners doing equivalent business in other States. This Court has repeatedly struck down, under both the Commerce Clause and Section 391, efforts by States to use discriminatory tax credits and exemptions in order to protect businesses conducting in-state activities from multiple taxation, while leaving businesses conducting interstate activities exposed to that risk. *See Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 483 U.S. 232 (1987) (Commerce Clause); *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987) (Commerce Clause); *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984) (Commerce Clause); *Westinghouse Elec. Corp. v. Tully*,

466 U.S. 388 (1984) (Commerce Clause); *Maryland v. Louisiana*, 451 U.S. 725 (1981) (Commerce Clause); *Arizona Pub. Serv. Co. v. Snead*, 441 U.S. 141 (1979) (15 U.S.C. § 391). The principles of those cases—whether employing constitutional or statutory analysis, and whether utilizing the "internal consistency" test or not—make clear that the New Hampshire tax scheme cannot stand.

The Special Master was also correct in determining that a refund of taxes paid (minus any amounts taken as a credit) was the proper form of retroactive relief. There is no basis for making the constitutional or statutory rulings prospective only, and the Eleventh Amendment is no barrier to an award of retroactive relief to the plaintiff States, even though the owners of Seabrook are the intermediaries by which it is obtained. And it is too late in the day for New Hampshire to claim what the statute on its face expressly *dis*claims: that, absent the credit, the legislature in 1991 would simply have enacted the Seabrook Tax anyway. It is thus entirely appropriate, by way of remedy, to restore the plaintiffs to the position that they would have occupied "if New Hampshire had never adopted its unconstitutional tax scheme." Final Report 44.

ARGUMENT

I. THE SEABROOK TAX AND CREDIT PROVISION, TAKEN TOGETHER, DISCRIMINATE IN FAVOR OF LOCAL COMMERCE IN VIOLATION OF THE COMMERCE CLAUSE AND FEDERAL LAW (15 U.S.C. § 391)

A. The Seabrook Tax and Credit Provision, Taken Together, Violate the Commerce Clause

Although the Commerce Clause is on its face a grant of power to Congress, this Court has long accepted the proposition that the Clause " 'by its own force created an area of trade free from interference by the States.' " *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. at 280 (quoting *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328 (1977)); *see Wyoming v. Oklahoma*, 112 S. Ct. 789, 800 (1992).[18] Thus, while States may properly require businesses engaged in interstate commerce to pay their own way, they may do so only by taxes that, among other things, "do[] not discriminate against interstate commerce." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). "One primary consequence of this constitutional restriction on state taxing powers . . . is that 'a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.' " *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. at 280 (quoting *Armco, Inc. v. Hardesty*, 467 U.S. at 642).

State taxation may discriminate on its face or in actual operation. Here, we submit, the New Hampshire tax scheme does both. Applying the test employed by the

[18] As we did before the Special Master, we discuss the constitutional issue before the statutory issue because the principles with regard to discrimination against interstate commerce have been more fully developed in that context. The Special Master ultimately found that the New Hampshire scheme was invalid on both constitutional and statutory grounds, though he addressed the statutory argument first.

Court with respect to claims of facial discrimination—the "internal consistency" test—it is readily apparent that the Seabrook Tax and the accompanying credit against liability for the New Hampshire Business Profits Tax are not internally consistent: that is, according to their own taxing principles, they expose interstate commerce to burdens not faced by wholly local operations. But, even without regard to the "internal consistency" test, it is clear that the tax system works just as it was designed to work: businesses with a greater amount of New Hampshire profits are favored over businesses with equal profits in other States. The statute thus "unquestionably discriminates against interstate commerce in favor of local interests." *Maryland v. Louisiana*, 451 U.S. at 756.

1. *The New Hampshire Tax Scheme Is Not Internally Consistent.* The Court first expressly applied the "internal consistency" test as a means of determining whether state taxes on multistate businesses were fairly apportioned to reach only that business conducted within the State. *See Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983); *Goldberg v. Sweet*, 488 U.S. 252 (1989). The Court later held, however, that "[a] similar rule applies where the allegation is that a tax on its face discriminates against interstate commerce." *Armco, Inc. v. Hardesty*, 467 U.S. at 644. *See also Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 483 U.S. at 240-48 (implicitly applying test); *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. at 284-87 (explicitly applying test).[14]

[14] In its brief, New Hampshire spends page after page trying to establish that this unequivocal statement does not mean what it says. *See* N.H. Br. at 27-35. Referring to (but not naming) "numerous opinions of this Court indicating that the test should not be applied in a case of this type," N.H. Br. at 28, the State goes on to establish nothing more than that the test has been most frequently used to determine whether taxes are fairly apportioned. But its use in that context does not nullify its use in cases of discrimination as well; the Court in *Armco*, while employing the test with respect to a claim of discrimination, expressly noted its origins in cases involving fair apportionment. 467 U.S. at 644. Indeed, New Hampshire ultimately appears to concede that the test *is* used in discrimination cases but then says that its use in that context is only to "evaluate compensating tax defenses." N.H. Br. at 30. This argument makes no sense at all. Even a cursory reading of *Armco, Inc.* and *Tyler Pipe* shows unmistakably that the inquiry into "internal consistency" and the inquiry into "compensating taxes" are two separate inquiries, although, of course, they may occur in the same case. The purpose of an inquiry with respect to "compensatory taxes" is not to identify whether discrimination has occured but simply to determine whether activities are so related that a tax on one activity can fairly be said to compensate for the inability to tax a second activity. The "internal consistency" test is not designed, and has not been used, to answer that latter question.

Applying the test to claims of facial discrimination, the Court has said that, to "have 'what might be called internal consistency . . . the [tax] must be such that, if applied by every jurisdiction,' there would be no impermissible interference with free trade." *Armco, Inc. v. Hardesty*, 467 U.S. at 644 (quoting *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. at 169). The test, therefore, does not look to whether a multistate business in fact pays more tax than a wholly intrastate business; rather it looks to whether the state tax scheme, by its own principles, creates the risk of such unequal burdens.[15] In *Armco*, where the State exempted local manufacturers from paying the state wholesale tax, and in *Tyler Pipe*, where the State exempted local wholesalers from paying the state manufacturing tax, the Court had no difficulty in concluding that discrimination was present: if every State had either tax system—the assumption made for purposes of applying the "internal consist-

[15] Explaining that actual multiple taxation need not be shown, the Court in *Armco, Inc. v. Hardesty* stated: "[a]ny other rule would mean that the constitutionality of [a State's] tax laws would depend on the shifting complexities of the tax codes of 49 other States, and that the validity of the taxes imposed on each taxpayer would depend on the particular other States in which it operated." 467 U.S. at 644-45.

ency" test—then companies doing their manufacturing and wholesaling in a single State would pay only one tax on those activities, while companies conducting the activities in two or more States would be subject to multiple taxation. 467 U.S. at 644-45; 483 U.S. at 246-48. The result is intrinsic discrimination against interstate conduct of those multiple commercial activities in favor of wholly intrastate conduct of the same activities.

The New Hampshire tax scheme suffers from precisely the same flaw. As structured, the statute assures a Seabrook owner that it will be immune from tax on its business profits, up to the amount of the Seabrook Tax, so long as those business profits are earned in New Hampshire; if some or all of those business profits are earned in other States, however, then the owner is faced with paying both the Seabrook Tax and taxes in the other States on the unsheltered business profits. Thus, for example, if two Seabrook owners each paid $1 million in Seabrook Tax, and one owner conducted all its business in New Hampshire and the other conducted all its business (except for ownership of Seabrook) in Connecticut, the first owner would face no tax liability at all on the first $12.5 million of its business profits, while the second owner would be subject to taxation on virtually all of the first $12.5 million of its business profits (except for the small amount attributed to New Hampshire as a result of owning Seabrook). That difference—resulting solely from the interstate or intrastate nature of the business—is discrimination, plain and simple.[16]

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[16] New Hampshire proposes an odd codicil to the "internal consistency" test under which the Court would assume not only that each State adopted the New Hampshire tax scheme but that the hypothetical taxpayers conducted all activities subject to taxation in each State. All this would do, of course, is muddle the comparison between intrastate and interstate business—perhaps the point of the suggestion—by attributing some "intrastate" activity to the interstate business and some "interstate" activity to the intrastate business. In a test that compares the effects of a taxing principle on

The "inconsistency" in this scheme results from the fact that New Hampshire has not applied a neutral principle to determine whether the activities of owning Seabrook and of earning business profits—like the activities of manufacturing and wholesaling at issue in *Armco* and *Tyler Pipe*—are activities properly subject to multiple taxation, or whether they are not. For example, a tax system that gave no credit for payment of the Seabrook Tax would be consistently treating the activities as separate and therefore subject to multiple taxation; or a tax system that (to take one possibility) reduced the Seabrook Tax by tax paid on business profits to *any* State would be consistently treating the activities as integrated and therefore subject only to a single tax. Each such tax scheme would be internally consistent: no company would be worse off for conducting the activities in different States rather than in one State. What is inconsistent, and hence impermissible, however, is the approach taken by the New Hampshire legislature—to treat the activities as properly subject to multiple taxation if performed in different States, but only to single taxation if performed in New Hampshire. *See American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. at 306 (Scalia, J., dissenting) ("[a] credit against intrastate taxes falls readily within the highly suspect category").[17]

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interstate businesses and on intrastate businesses, it hardly seems sensible to make the categories less distinct. Moreover, to the extent that this new set of assumptions might decrease the amount of discrimination in any particular case, it would do so for exactly the reason that one would think: the discrimination is more beneficial to businesses as their intrastate activity increases and less beneficial as it decreases.

[17] As we have discussed in our "Exceptions and Brief in Support for Intervenors," filed on March 15, 1993, the Seabrook Tax is discriminatory even without regard to the provision for credit against the Business Profits Tax. The reason, however, is that New Hampshire has deliberately placed a special burden on one facility used primarily in interstate commerce, not that the Seabrook Tax, taken by itself, is internally inconsistent.

Although New Hampshire says that, in allowing the credit, the State is merely deciding "not to tax a portion of the business profits that it is clearly entitled to tax," N.H. Br. at 34-35, that statement, while true, is wholly beside the point. Far from offering a justification for its discrimination, New Hampshire is simply restating what credits do: every discriminatory credit could be described in such terms. Thus, West Virginia in *Armco* could say that it was not imposing a tax on certain sales (those subject to the local manufacturing tax), or Washington in *Tyler Pipe* could say that it was not imposing a tax on certain manufactured items (those subject to the local wholesale tax). Regardless of the description, however, the fact remains that the two activities are treated as subject to a single tax, and the decision "not to tax" is made, *only* if they both are performed in-state. It is just that sort of parochial favoritism that the Commerce Clause serves to forbid.

We recognize, of course, that interstate commerce often may wind up bearing a greater tax burden than purely intrastate commerce, but that fact does not, as New Hampshire appears to believe (N.H. Br. at 42), mean that the existence of a heavier burden is a matter of indifference under the Commerce Clause. A principal benefit of applying the "internal consistency" test in discrimination cases is that it distinguishes, on the one hand, cases in which the risk of multiple taxation of interstate activities arises from application of different tax principles by different States (permissible under the Commerce Clause) from, on the other hand, cases in which the risk of multiple taxation arises from application of discriminatory tax principles by a particular State (impermissible under the Commerce Clause). For example, if Washington has a tax on manufacturing (but no tax on wholesaling) and Oregon has a tax on wholesaling (but no tax on manufacturing), a company doing interstate business may pay two taxes—by manufacturing in Washington and wholesaling in Oregon—as a result of the different tax choices

made by the two States. But each tax is itself internally consistent because, if every State taxed only manufacturing (like Washington) or only wholesaling (like Oregon), both interstate and intrastate business would be on exactly the same footing (paying one tax).[18] If Washington taxes both wholesaling and manufacturing, however, and further credits the state wholesale tax against the state manufacturing tax, the internal consistency is lost: then a Washington manufacturer wholesaling in Washington pays just once, while a Washington manufacturer wholesaling in Oregon pays twice. This inequality—and the fact that it arises from a single, discriminatory tax principle—are immediately apparent upon application of the "internal consistency" test.

The inability of the New Hampshire tax scheme to satisfy the "internal consistency" test is enough, in and of itself, to establish its unconstitutionality. *See Armco, Inc. v. Hardesty*, 467 U.S. at 644-46 (striking down tax scheme based on discriminatory structure); *Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 483 U.S. at 240-48 (same). As we discuss in the next section, however, it is also clear that the scheme can and does produce the discriminatory effects dictated by its discriminatory structure.

2. *The New Hampshire Tax Scheme Necessarily Discriminates in Actual Operation.* a. Even prior to explicit application of the "internal consistency" test, this Court had struck down systems of taxes and tax credits that, taken together, conferred a preference on local business. In *Maryland v. Louisiana*, for example, the Court found that a Louisiana tax scheme "unquestionably discriminates against interstate commerce in favor of local interests as

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[18] In addition, the nature of the respective tax schemes means that in some cases—those involving Oregon manufacturers selling at wholesale in Washington—interstate commerce would fare *better* than wholely intrastate commerce, paying no tax as opposed to a single tax.

the necessary result of various tax credits and exclusions." 451 U.S. at 756. The Court observed that Louisiana had exempted natural gas "used for certain purposes within Louisiana" from its First-Use tax, while "[c]ompetitive users in other States are burdened with the Tax." 451 U.S. at 756. Moreover, as part of the same tax scheme, Louisiana had "provide[d] important tax credits favoring local interests." *Id.*[19] Although the Court recognized that "further hearings would be required to provide a precise determination of the extent of the discrimination in this case," 451 U.S. at 759-60, it nevertheless struck down the Louisiana tax system, stating that it "need not know how unequal the Tax is before concluding that it unconstitutionally discriminates." 451 U.S. at 760.

The Court reached a similar conclusion in *Westinghouse Elec. Corp. v. Tully*. There, it struck down as discriminatory a New York tax scheme that provided an escalating credit against New York income tax as businesses conducted more of their shipping activities within the State. The Court noted that the credit provision discriminated against businesses operating outside of New York because it "ha[d] the effect of allowing a parent a greater tax credit on its accumulated DISC income as its subsidiary DISC moves a greater percentage of its shipping activities into the State of New York. Conversely, the adjustment decreases the tax credit . . . as the DISC increases its shipping activities in other States." 466 U.S. at 400. The tax scheme, therefore, not only "provide[d] a positive incentive for increased business activity in New York State," but also "penalize[d] increases in . . . shipping activities in other States." 466 U.S. at 400-01 (internal citation omitted). *See also Boston Stock Exchange v. State Tax Comm'n, supra* (striking down tax credit as discriminatory).

[19] Of particular relevance here, Louisiana provided that payors of the First-Use Tax to Louisiana could credit that payment against liability for severance taxes in Louisiana. 451 U.S. at 756. The credit was of value, therefore, only to the extent that taxpayers conducted a second taxable activity in the State.

These cases—and later cases like *Armco* and *Tyler Pipe*, discussed earlier—make absolutely clear that States cannot use an interlocking scheme of taxes and tax credits to favor local commerce, any more than they can do so by a single discriminatory tax. Yet, in tying together the Seabrook Tax and a compensating credit against tax on local business profits, that is precisely what New Hampshire has done. In effect, the tax and credit provisions have created a sliding scale pursuant to which companies can offset tax on their business profits to the extent that they earn their profits in New Hampshire and not elsewhere. Until the credit is exhausted, the system directly rewards companies as their business profits increase within the State and directly penalizes companies whose profits arise in other States.[20]

Although many of the relevant cases involved taxes on discrete transactions, instead of aggregate taxes (like income taxes), that fact does not change the constitutional analysis. On the contrary, the Court has expressly refused to draw any such distinction. *See Westinghouse*

[20] Although New Hampshire tries to distinguish *Maryland v. Louisiana*—arguing that credit for payment of the First-Use Tax against state severance taxes was discriminatory because it "was only available if the taxpayer was engaged in the business of extracting natural resources within Louisiana" (N.H. Br. at 46)—its discussion actually confirms that the New Hampshire statute, just like the Louisiana statute, is discriminatory. Just as the First-Use taxpayer in Louisiana could claim a credit only against taxes upon extraction in Louisiana (and not in other States), a Seabrook taxpayer in New Hampshire can claim a credit only against taxes on income earned in New Hampshire (and not in other States). Put another way, the credit for payment of tax on one in-state activity (here, ownership of Seabrook) is "only available" if, and to the extent that, a taxpayer conducts a second activity subject to tax in the same State. The discrimination here is thus no different from—indeed, takes the very same form as—the discrimination found in *Maryland v. Louisiana*.

Elec. Corp. v. Tully, 466 U.S. at 404. There, the Court rejected an argument that the principles banning discrimination with respect to "transactional taxes" are inapplicable to "taxes on general income," observing: "It cannot be that a State can circumvent the prohibition of the Commerce Clause against placing burdensome taxes on out-of-state transactions by burdening those transactions with a tax that is levied in the aggregate—as is the franchise tax—rather than on individual transactions." *Id.* It is thus the fact of the discrimination, not the form of the discrimination, that is controlling.[21]

The *extent* of discrimination suffered by each Seabrook owner depends, of course, upon the extent of its business in New Hampshire. For companies like United Illuminating and Canal, which (apart from ownership of Seabrook) do no business in New Hampshire, the capacity to exempt their business profits from taxation is limited at best. Thus, United Illuminating (paying $4.2 million in Seabrook Tax) escapes tax on just $3.6 million of its business profits; Canal (paying $850,000 in Seabrook Tax) and its related companies escape tax on less than $1 million of their business profits. Yet, if those companies did more of their business in New Hampshire, they could earn up to $52.5 million and $10.5 million in business profits, respectively, without facing additional tax

[21] New Hampshire correctly notes (N.H. Br. at 48) that the Court in *Westinghouse Elec. Corp. v. Tully* said that "it is not the provision of the credit that offends the Commerce Clause, but the fact that it is allowed on an impermissible basis . . . ." 466 U.S. at 406 n.12. But there is nothing helpful to New Hampshire in that observation, which makes the straightforward point that credits do not violate the Commerce Clause in and of themselves, but only when they operate on a discriminatory basis. The Special Master, of course, did not say that all credits are impermissible; rather, he concluded that the operation of the credit here—like the credits and exemptions in *Westinghouse, Maryland v. Louisiana, Armco, Inc.* and other cases—did discriminate against interstate commerce.

liability. Because their business is conducted in other States, however, the equivalent level of business profits is fully subject to tax.[22]

Companies like New England Power and Northeast Utilities, by contrast, are freed of the obligation to pay tax on a far more significant amount of their business profits. Because each of them has substantial operations in New Hampshire, they are relieved of liability for tax on profits of $20 million (NEP, 1992) and $105 million (NU, 1993), based on payments of Seabrook Tax of $2.4 million and $9.5 million, respectively. It should be noted, however, that even these companies suffer *some* present, identifiable discrimination: because each of them is expected to have some unused credit, they would be able to offset tax on even more business profits if those profits were earned in New Hampshire rather than in other States. And all companies must take the discriminatory tax scheme into account in making business decisions about whether to locate new (or even existing) property, personnel, and sales in or out of New Hampshire. *See American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. at 283 (relevant to ask "if the revenue measures maintain state boundaries as a neutral factor in economic decisionmaking").

b. New Hampshire nonetheless claims that it shows "no favoritism toward owners engaged in intrastate sales of electricity." N.H. Br. at 27. To the extent that this argument rests upon the coincidence that PSNH suffered losses in 1991 and 1992, it is simply off-the-mark: as the Special Master pointed out, the important point is that "the Seabrook Tax credit 'backstopped' any intrastate utility, *guaranteeing* that, no matter what its profits

[22] Although we do not think it necessary to prove actual multiple taxation, the fact is that each of the owners of Seabrook Station (except for governmental entities) is subject to taxation on business profits in other States in which it does business. *See* Final Report 11-12; Stip. ¶ 2.4.

picture or its tax status, its intrastate customers would pay only one tax up to the point of the full Seabrook Tax paid." Final Report 22. By its very structure, the system of interlocking taxes and credits assures an owner that it will be fully protected from tax on its profits, up to the amount of the credit, so long as it earns those profits within the State, an assurance not given to owners earning equivalent profits in other States. That discrimination is always present, even where—because of fortuitous circumstances like lack of profitability—it does not have full effect on each of the Seabrook owners in a given year. Unless *all* Seabrook owners are and always remain unprofitable (and, thus, have no potential liability for tax on profits in *any* State) or unless *all* Seabrook owners always use up the entire amount of their credit[23] —neither of which circumstances is even remotely likely —the statute will inevitably create differences among Seabrook owners based solely upon whether their profits are earned in New Hampshire or other States. That continuing, pervasive discrimination is barred by the Commerce Clause.

In any event, it is flatly incorrect to claim that those companies with greater in-state sales are not favored by the statute.[24] The figures just discussed make clear that

[23] Even if all Seabrook owners used up all of their respective credits, the statute would be exerting the same "hydraulic pressure" to earn income in New Hampshire and not in other States. Thus, whether or not the particular differences among Seabrook owners were eliminated in that situation (not, in any event, present here), the statute would still be producing effects prohibited by the Commerce Clause. *See* note 28 *infra*.

[24] The discriminatory effects of the New Hampshire tax scheme are fully apparent from the facts demonstrating operation of the scheme from its enactment to the present. We note in passing, however, that use of projections to illustrate the likely effects in future years is a perfectly reasonable means of assessing the legitimacy of the tax scheme. Even though New Hampshire complains about any reliance on projections, the State has itself relied on projections—indeed, projections made by Northeast Utilities, one

New England Power, paying $1.8 million *less* in Seabrook Tax than United Illuminating, is able to earn almost $17 million *more* in business profits without incurring any additional tax liability. That result comes about for one reason and one reason only: those profits are earned in New Hampshire, rather than in another State. The projected figures for Northeast Utilities show the same sort of favoritism in, if anything, even more striking terms. *See* page 25 *supra*.[25]

It is also misguided for the State to claim that "the failure to tax business profits since the Nuclear Property Tax was enacted has been more meaningful for interstate than for in-state utilities." N.H. Br. at 52. Even if that were correct (*but see* pages 24-25 *supra*), an inquiry into whether various Seabrook owners make greater or lesser use of the credit against liability for the New Hampshire Business Profits Tax is not the proper inquiry because it looks at only one side of the equation: taxes in New Hampshire. To identify discrimination, it is necessary to ask, not just whether the credit allows owners of Seabrook to escape liability for income taxes *in New Hampshire*, but whether owners earning profits largely in other States are faced with liability not faced by businesses earning equivalent profits in-state; *that* question requires consideration, not just of their exposure to income taxes

of the Seabrook owners—to resolve important matters with respect to utility reorganization. *See In re Northeast Utilities/Public Service Company of New Hampshire Reorganization Proceedings*, 114 P.U.R.4th 385, 400 (1990) (State sought finding that "NU has met its burden of proving that its underlying assumptions regarding the Rate Agreement and its financial forecasts are reasonable . . .").

[25] As the Special Master pointed out, Final Report 29-33, the reason that Northeast Utilities receives these significant benefits from the New Hampshire tax scheme—as compared to United Illuminating, for example—is that it acquired PSNH in 1992, thus greatly increasing the amount of business that Northeast Utilities conducts in New Hampshire.

in New Hampshire, but of their exposure in other States as well.[26]

The correct nature of the inquiry is again made clear by the prior cases striking down discriminatory tax schemes. For example, in *Maryland v. Louisiana*, it was self-evident that a business paying the First-Use Tax to Louisiana but not extracting any minerals there was no worse off *in Louisiana* than another company paying the First-Use Tax and using the credit against liability for Louisiana severance taxes: in that situation, *neither* company would face liability in Louisiana for severance taxes (up to the amount of First-Use Tax paid). But the critical element is that the interstate business *does* face liability for severance taxes elsewhere, for which its credit does it no good. When that potential liability is taken into account—as it must be to identify discrimination between intrastate and interstate commerce—then it is immediately apparent that the credit provision offsetting one local tax against another does have a discriminatory effect: it "encourage[s] natural gas owners involved in the production of OCS gas [and thus paying the First-Use Tax to Louisiana] to invest in mineral exploration and development within Louisiana rather than to invest in further OCS development or in production in other States." 451 U.S. at 757.

The inequality in the New Hampshire tax scheme can be readily seen, in fact, by looking at the two taxes in

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[26] This point plainly escapes New Hampshire. In its discussion of the effects of its tax scheme, it repeatedly addresses only the exposure of Seabrook owners to taxes in New Hampshire and makes no effort to discuss exposure to taxes in other States on equivalent activities (except to make the obvious, and irrelevant, point that all States apportion income). *See, e.g.*, N.H. Br. at 47, 52-53. As a result, it does not make any meaningful comparisons between companies similarly situated except for the States in which they earn their profits—the necessary comparison for a claim of discrimination of this sort.

reverse order. If New Hampshire had written its statute to provide that "any business profits tax paid to New Hampshire (but not to any other State) shall be credited against liability for the Seabrook Tax," the discrimination against companies earning their profits in other States would have been obvious, just as was the discrimination in *Armco* against companies paying manufacturing taxes elsewhere but not allowed to deduct them against the West Virginia wholesale tax. But a tax scheme is no less discriminatory merely because the taxes and credit provision are turned around. *See Tyler Pipe, supra* (striking down a statute reversing the credit at issue in *Armco*). Here, for the Seabrook owners, the effect of the present tax scheme is identical to the effect of the hypothetical statute set out above: in either case, companies with New Hampshire profits are able to avoid multiple taxation to the extent of, but only to the extent of, those profits.

It is theoretically possible, of course, for Seabrook owners to lessen, or even avoid, the discrimination inherent in the New Hampshire tax scheme by increasing the amount of business that they do in New Hampshire. But that is hardly a defense of the scheme. In the first place, it will often be very costly—and in the context of utility companies subject to regulatory oversight, simply not practical or realistic—for a business to shift a substantial amount of its operations into a particular State. The owners of Seabrook, for the most part, make wholesale sales to affiliated companies and retail sales in franchised areas outside of New Hampshire. It would require a general restructuring of their businesses—or the acquisition, perhaps, of New Hampshire utilities (see note 25 *supra*)—to provide them significant relief from the inequality of the tax system. Imposition of such a burden only on companies not already conducting their affairs in-state is itself discriminatory. *See Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. at 336 (condemning use of "power to tax an in-state operation as a

means of requiring [other] business operations to be performed in the home State") (internal quotes omitted).

In any event, the argument is legally insufficient. Only last Term, the Court declined to accept a similar argument, finding "no authority" for the notion "that a tax that does discriminate against foreign commerce may be upheld if a taxpayer could avoid that discrimination by changing the domicile of the corporations through which it conducts its business." *See Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue and Finance*, 112 S. Ct. 2365, 2370 (1992).[27] Indeed, any other conclusion would be intolerable since, in virtually any case of discrimination, the disadvantaged taxpayer retains the "option" either to succumb to the discrimination or to seek entry into the favored class. Thus, in *Westinghouse Electric Corp. v. Tully*, the taxpayer could have shifted shipping operations to New York; in *Armco* the taxpayer could have chosen to manufacture goods in West Virginia; in *Tyler Pipe* a Washington manufacturer could have sold its products only within the State. Yet, despite these possible (if impractical) courses of action, the Court found each of the tax systems unconstitutional, making clear that States cannot make discriminatory tax schemes into a tool for penalizing companies that elect to do business outside their borders.[28]

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[27] Although *Kraft* involved the Foreign Commerce Clause, the cases cited by the Court—*Westinghouse Electric Corp. v. Tully*, *supra*, and *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963)—make clear that its views are fully applicable to the domestic Commerce Clause as well.

[28] The Court, in fact, has invalidated state tax systems even where some out-of-state companies actually were able to take advantage of the discriminatory structure. Thus, in *American Trucking Ass'ns, Inc. v. Scheiner*, the Court struck down an unapportioned flat tax imposed on travel within Pennsylvania—on the ground that, viewed in terms of cost-per-mile, it generally favored intrastate truckers—even though it recognized that some interstate truckers traveled more miles in the State than some intrastate truckers. The Court found the skewing of business decisions itself to be inappropriate, stating that the tax had a "forbidden impact

Finally, although it is not necessary in order to establish a claim of discrimination, it should be noted that the inequality established by the New Hampshire statutes is anything but accidental. As the legislative history unmistakably shows, the New Hampshire legislature, faced (like many States) with a need for additional revenues, sought to define and impose a tax burden that would fall exclusively on out-of-state taxpayers. The credit provision was part of this strategy because it assured that PSNH, then the largest single owner of Seabrook, would be given substantial protection against taxation of future business profits. That the credit was of little benefit to most Seabrook owners, far from being a defect in the statute, was regarded as a positive feature. The Chairman of the legislative subcommittee that drafted the bill even described the taxing scheme as being "a tax in the New Hampshire tradition of finding some way for the other fellow to pay." Remarks of Rep. Robert Hayes, The N.H. House of Representatives Floor Debate Re: House Bill 64, April 2, 1991, pp. 25-26.

The statute operates just as intended. The less business a Seabrook owner has in New Hampshire, the greater is its exposure to multiple taxation. Like the tax scheme in *Tyler Pipe*, the New Hampshire tax scheme only "operates to impose a unified tax eliminating the risk of multiple taxation when the [activities] are both carried out within the State." 483 U.S. at 246. That it cannot do. "[A] state tax that favors in-state business over out-of-state business for no other reason than the location of its business is prohibited by the Commerce Clause."

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on interstate commerce because it exerts an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure rather than 'among the several States.'" 483 U.S. at 286-87 (quoting U.S. Const., art. I, § 8. cl. 3). *See* Final Report 38 (noting that Seabrook Tax and credit scheme exert "hydraulic pressure" on Seabrook owners with unused credits to increase business activities in New Hampshire).

American Trucking Ass'ns, Inc. v. Scheiner, 483 U.S. at 286.[29]

B. The Seabrook Tax and Credit Provision, Taken Together, Violate Federal Law (15 U.S.C. § 391)

The Seabrook Tax and credit provision also violate the provisions of 15 U.S.C. § 391. That statute prohibits any State from "impos[ing] or assess[ing] a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity." Moreover, it broadly defines as discriminatory any tax that "results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce."

This Court, in *Arizona Pub. Serv. Co. v. Snead, supra*, relied upon Section 391 to strike down a New Mexico tax scheme that, like the New Hampshire system here, imposed a seemingly neutral tax on all companies engaged in a defined local activity, but then tied that tax, by means of a credit, to a second tax on a local activity. There, while all owners of the Four Corners power stations paid the first tax (an electrical energy tax) on equal terms, the credit allowed those companies selling in New Mexico to ameliorate its impact by reducing liability for the state gross receipts tax. The Court found the inter-

[29] The State makes the traditional *in terrorem* argument: that, if its statute is struck down, States will be barred from using credits to encourage important activities. N.H. Br. at 50 n.24. But, in cases where credits are used for regulatory purposes (and not simply to favor local commerce), even discriminatory credits may be upheld so long as they are justified by "a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988). Credits not meeting that standard, of course, are already subject to invalidation under *New Energy Co.*

play between the two taxes to be discriminatory, remarking: "The tax-credit provisions of the Act itself insure that locally consumed electricity is subject to *no* tax burden from the electrical energy tax, while the bulk of the electricity generated in New Mexico by the appellants is subject to a 2% tax, since it is sold outside the State." 441 U.S. at 149.

The legislative history of Section 391 shows that Congress was well aware that States might use tax credits to create discrimination against out-of-state producers or consumers of electricity. In its report on the bill that became Section 391, the Senate Finance Committee, specifically referring to the New Mexico tax, observed that the "credit normally benefits only domiciliaries of the taxing State since no credit is allowed for electricity produced within the State and consumed outside the State." S. Rep. No. 938, 94th Cong., 2d Sess., pt. I, at 437 (1976). The ultimate effect, as the Committee recognized, was that "the cost of the electricity to nondomiciliaries is normally increased by the cost the producer of the electricity must bear in paying the tax," while "the cost to domiciliaries . . . does not include the amount of the tax." *Id.* It was just that sort of inequality—whether achieved "directly or indirectly"—that Section 391 was enacted to stop.

Against this background, it seems self-evident that the New Hampshire tax scheme runs directly afoul of the prohibitions of Section 391: like the scheme in New Mexico, the New Hampshire tax provisions expose utilities conducting business elsewhere to higher tax burdens than if they conducted the same business in-state. To avoid the holding of *Arizona Public Service*, therefore, New Hampshire argues that the Nuclear Property Tax is not a tax "on or with respect to the generation or transmission of electricity" as required by the statute. N.H. Br. at 54-59. But, as the Special Master recognized (Final Report 18-19), the statute explicitly uses broad

language to prohibit any discriminatory tax: indeed, the inclusion of the phrase "with respect to" in addition to the word "on" necessarily conveys an expansive congressional meaning, or it would be mere surplusage.[30] And it would be a very odd use of language to declare that a tax on property *defined* by its specific use in generating electricity (property "used in generating, producing, supplying, and distributing electric power or light")—and the value of which ($3.5 billion) depends directly on its use for that purpose—is anything other than a tax "with respect to" the generation of electricity.

The second sentence of Section 391 confirms that a cramped reading of that section would be out of place. For Congress was careful to specify that a tax is discriminatory "if it results, *either directly or indirectly*, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity generated and transmitted in intrastate commerce" (emphasis added). This language requires that a court take full account of the tax burden, both direct and indirect, that electricity sold in interstate commerce is required to bear. A tax on property specifically designed and used for generating electricity is obviously part of the tax burden incurred in generating that electricity, at least "indirectly" if not "directly."

The loophole that New Hampshire seeks to create is also incompatible with Congress' evident purpose in Section 391. Were New Hampshire correct, it apparently would mean that New Mexico, following the decision in *Arizona Pub. Serv. Co. v. Snead*, could have simply repealed its electrical energy tax, imposed a property tax designed to raise the same amount, *allowed the same*

[30] The phrase "with respect" to" is a broad phrase—similar to the phrase "relates to," which the Court has recently described as "'deliberately expansive' language." *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 482 (1990) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987)).

credit (now for the property tax) against the local gross receipts tax, and successfuly gotten around the prohibitions of Section 391. Yet, there is absolutely no reason to think that Congress would have been willing to tolerate *that* discrimination, simply because it was achieved by altering the form of the tax. To the contrary, the use of phrases like "with respect to" and "directly and indirectly" suggests that Congress meant to prohibit discriminatory taxation relating to the generation of electricity, no matter what form it took.

II. THE PROPER REMEDY INCLUDES A REFUND OF THE SEABROOK TAX.

A. There Is No Basis for Making the Ruling in This Case Prospective Only.

New Hampshire contends that, even if its tax scheme violates the Commerce Clause or 15 U.S.C. § 391, retroactive relief is inappropriate. On the threshold issue—whether the ruling of this Court should apply to the past as well as the future—New Hampshire argues that any decision holding the New Hampshire tax scheme invalid should be deemed prospective only, under the decision in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). *See* N.H. Br. at 63-65. This argument is simply insupportable.

To begin with, as the Special Master pointed out (Final Report 39), there is substantial doubt about whether *Chevron* remains controlling authority on the choice-of-law issue. The divided opinions in *American Trucking Ass'ns v. Smith*, 496 U.S. 167 (1990), and in *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991), make clear that it is now open to question whether a decision may *ever* be made prospective only—*i.e.*, not even applicable to the case in which it is announced—because such a decision has an "advisory" character. Indeed, in *American Trucking Ass'ns*, a majority of the Court expressed the view that, as a choice-of-law matter, the law determined by the decision in

a case necessarily governs the conduct at issue in the case. *See* 496 U.S. at 200-01 (Scalia, J., concurring in the judgment); *id.* at 212-24 (Stevens, J., with whom Brennan, Marshall, & Blackmun, JJ., join, dissenting). If that view is now the law, then New Hampshire's *Chevron* argument founders on its own premise.[31]

In any event, even if *Chevron* is good law, New Hampshire cannot meet even the initial requirement set by that decision. The primary legal ground on which the New Hampshire tax scheme is invalid—the discriminatory, internally inconsistent linking of two local taxes through a credit provision—is anything but new. As we have shown, invalidity on this ground was more than merely "foreshadowed" (*Chevron*, 404 U.S. at 106) by federal law at the time that this tax scheme was enacted; invalidity was readily apparent from the repeated decisions of this Court striking down state tax schemes on precisely this ground. *See, e.g., Tyler Pipe; Armco v. Hardesty; Westinghouse Corp. v. Tully; Arizona Pub. Serv. Co. v. Snead.* Accordingly, as the Special Master concluded (Final Report 40-41), New Hampshire can have no plausible basis for pleading surprise at a ruling that its tax scheme is unlawful: it simply has no claim that such a ruling upset any legitimate reliance on prior authority.[32] New Hampshire therefore fails at the first step—as well as later steps (*see* Final Report 41)—in seeking entry into the narrow class of cases (if it exists at all) in which courts may declare the law in a purely prospective manner.

[31] We note that, in *Harper v. Virginia Dep't of Taxation*, No. 91-794, the Court has pending before it issues regarding the prospectivity of decisions declaring tax statutes to be unconstitutional.

[32] Seeking support in *American Trucking Ass'ns v. Smith*, New Hampshire says that it "was entitled to rely on established precedent upholding property taxes and on the absence of any decision invalidating a nondiscriminatory income tax credit." N.H. Br. 65. The primary flaw in New Hampshire's tax scheme, however, is that it is *not* simply a property tax (it links two taxes through a credit) and its credit *is* discriminatory. Moreover, *Smith* cannot help New Hampshire, because the plurality there applied *Chevron* only after noting that the decision on which the Court relied had actually overruled prior authority. 496 U.S. at 179-80. There is no such departure from prior law in this case.

B. The Appropriate Retroactive Relief Is a Refund of the Seabrook Tax.

New Hampshire also seeks to escape the award of retroactive relief by arguing that, under *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 40 (1990), the Court need not order refunds of the Seabrook taxes paid (minus the increased business profits tax due upon striking the credit provision). N.H. Br. at 66-69. The Special Master properly concluded, however, that the remedy in this case should "put the parties back into the positions they would have held if New Hampshire had never adopted its unconstitutional tax scheme." Final Report 44. The Special Master, likewise, was correct in deciding that a refund, adjusted for credits taken, was the most appropriate means of retroactive relief.

We note, at the outset, that New Hampshire does not quarrel with the remedial standard employed by the Special Master: that is, to "put the parties back into the positions they would have held if New Hampshire had never adopted its unconstitutional tax scheme." *Ibid.* Its argument is simply that the Court should allow the State, rather than the Court, to decide (at least initially) what those "positions" would have been. But, as the Special Master pointed out, the legislature enacting the Seabrook Tax spoke to precisely that question: by including a nonseverability clause in the statute, it made clear that any assessment of the Seabrook Tax was conditioned upon—and could not exist without—the allowance of a credit for payment of that tax against liability for the state Business Profits Tax.

Contrary to the argument now made by the State, N.H. Br. at 69, the nonseverability clause does not ad-

dress only the future and not the past. The inclusion of a nonseverability clause in a statute—an action that is more the exception than the rule[33]—reflects an overt legislative judgment that the two provisions must exist together or not at all. Because the grant of a discriminatory credit was unconstitutional from the moment that the Seabrook Tax took effect, retention of the Seabrook Tax revenues can be justified only if it can reasonably be said that the legislature in 1991 would have enacted that tax without the credit. But, if that had been the intention of the legislature—and an achievable result in light of the political realities of the time—then it appears obvious that the legislature would simply have left the tax and credit subject to the general severability clause. *See* note 33 *supra*. Instead, the legislature drafted a specific nonseverability clause saying just the opposite. *See Bowsher v. Synar*, 478 U.S. 714, 735-36 (1986) (where statute specifies the consequences of partial invalidation, such a provision is "fully operative as a law" and should be followed in preference to "creative and imaginative statutory surgery") (internal quotations omitted).[34]

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[33] Indeed, the legislation containing the Seabrook Tax and the accompanying credit has a separate provision declaring all provisions to be severable *except* for the Seabrook Tax and credit. 1991 N.H. Laws, c. 354:20.

[34] New Hampshire also argues that the combination of the Seabrook Tax and credit works "no actual discrimination" against "[u]tilities engaged in interstate commerce," which, New Hampshire says, actually were the principal "beneficiaries" of this scheme. N.H. Br. at 67. But, as an initial matter, New Hampshire rests this assertion on the hypothetical effects of the Seabrook Tax without the credit—precisely the unhinging of tax and credit that the New Hampshire legislature declared to be unacceptable. Moreover, the argument incorporates the same mistake that New Hampshire makes on the merits: as we have previously noted (*see* pages 24-25 *supra*), *all* Seabrook owners subject to tax on their business profits suffer the effects of the discriminatory structure of the statute, in varying degrees.

The decision in *McKesson* is not to the contrary. There, the Court simply held that, when a tax is declared to be discriminatory (and there is no basis for a prospective ruling), the due process clause requires that taxpayers be given "meaningful backward-looking relief." 496 U.S. at 31.[35] In *McKesson*, however—a case that involved an exemption from a tax on alcoholic beverages for certain beverages made from local products—there was concededly an open question whether the retroactive relief could take the form of an excision of the exemption or whether a refund (or some similar relief) was required, and the Court left that question for decision by the state courts on remand. In this case, by contrast, the legislature has already answered the question left open on remand in *McKesson*: it has declared that the tax and credit must be considered as "a unit." Final Report 43. If the taxpayers cannot take the credit in the past (and, because it is discriminatory, they cannot), then it is inconsistent with that declaration to say that the payments of the Seabrook Tax are to be treated as a separate, independent event for purposes of the remedy.

Although New Hampshire would plainly like to reconstruct these legislative determinations after-the-fact—perhaps as a lesson to taxpayers challenging discriminatory credits from which they receive some (though lesser) benefits—there is no good reason to allow it to do so. As the Special Master stated, "it reasonably should have been apparent to New Hampshire that its Seabrook Tax and credit scheme was of dubious constitutionality." Final Report 41. As a result, "[t]o the extent New Hampshire suffers hardships as a result of a retroactive decision, they are largely of its own making." Final Report 41. Indeed,

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[35] The Court in *McKesson* applied this principle to cases in which taxpayers were compelled to pay the taxes "under duress." The Special Master found that "[t]he Seabrook owners were 'under duress' to pay the Seabrook Tax when due and were relegated to postpayment refund action." Final Report 42.

insofar as the refund is brought about by the nonseverability clause, that is a perfectly appropriate consequence of a provision designed to reassure those owners with the greatest in-state business that they would not have to bear the general obligation (the Seabrook Tax) without at the same time gaining the advantages of the discriminatory offset (the credit). Against that background, it is too late now for New Hampshire to claim that the tax and credit were really unconnected all along.

C. The Eleventh Amendment Is No Bar to Refund Relief.

New Hampshire's final effort to escape the remedy of a refund relies on the Eleventh Amendment. N.H. Br. 69-74. New Hampshire briefly argues that the Eleventh Amendment would bar a refund in this case because, the State says, intervenors' rights "cannot exceed the rights they would have if they had been entitled to maintain an action in this Court in their own names." *Id.* at 72-73. But it is established law that the plaintiff States are entitled to the requested remedy—*i.e.*, to an order directing payment of a refund directly to the intervenor taxpayers—and that the Eleventh Amendment is no bar to such relief. That is precisely the relief that was awarded in *Maryland v. Louisiana*, 452 U.S. 456, 456-57 (1981) (entering decree ordering refunds be paid to the taxpayers), after the Court had rejected Louisiana's Eleventh Amendment objection to the suit. *Maryland v. Louisiana*, 451 U.S. at 745 n.21. This case is no different.

It is true that a State may not exploit its freedom from Eleventh Amendment limits to bring a suit that seeks only "to recover for injuries to specific individuals" rather than to vindicate its own interests. *Maryland v. Louisiana*, 451 U.S. at 745 n.21; *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 258 n.12 (1972). Such a suit is a private suit in everything but name: the real parties in interest

are the private individuals. But there is no such subterfuge here, for the plaintiff States have sued to vindicate *their own* interests—as ultimate purchasers of electricity and as sovereign representatives of all their residents who purchase electricity.[38] The relief sought vindicates those interests even though a discrete number of intervenors are the immediate beneficiaries—just as in *Maryland v. Louisiana*, *supra*, and (for example) in *Arizona v. California*, 460 U.S. 605, 613-14 (1983) (allowing intervention of Indian Tribes over Eleventh Amendment objection); 466 U.S. 144 (1984) (awarding water rights directly to the Tribes). Here, as in those cases, the State is entitled to relief that runs directly to private intervenors as a means of indirectly protecting its own interests (in utility bills unaffected by a discriminatory tax). The Eleventh Amendment presents no obstacle to this relief.

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[38] New Hampshire also argues that the Eleventh Amendment is a bar because, as a matter of fact, the utilities are not "merely a conduit to consumers." N.H. Br. at 71. But the State made no such factual argument before the Special Master—other than to assert, in a footnote, that "before January 19, 1993, no Connecticut consumers, including the State government, will pay any Nuclear Property Tax." Answering Brief of New Hampshire Before the Special Master at 86 n.35. Having chosen not to press a more general argument before the Special Master, New Hampshire can hardly complain that the Master did not accept it. Moreover, even if it were not tardy, the argument simply ignores the fact that, despite differing time periods, consumers burdened in the past by increased utility costs attributable to the Seabrook Tax are seeking to benefit in the future by decreased utility costs attributable to the refund of that tax.

CONCLUSION

The Court should enter judgment for intervenors and against the defendant on their claims under the Commerce Clause and Section 391.

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